

No. _____

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

IN RE GENERAL MOTORS LLC, GENERAL MOTORS COMPANY,

Petitioners.

On Appeal from the United States District Court for the
Eastern District of Michigan,
No. 2:19-cv-13429

**EMERGENCY PETITION FOR WRIT OF MANDAMUS
(ACTION REQUESTED BEFORE JULY 1, 2020)**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Petitioners certify as follows: General Motors LLC is a Delaware limited liability company whose only member is General Motors Holdings LLC. General Motors Holdings LLC's only member is General Motors Company, a Delaware corporation with its principal place of business in Wayne County, Michigan. General Motors Company owns 100% of General Motors Holdings LLC. General Motors Company does not have a parent corporation and no publicly held corporation owns more than ten percent of its stock.

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INTRODUCTION

Mandamus is an extraordinary measure. But extraordinary circumstances call for extraordinary measures. The order at issue here is extraordinary in every respect.

This petition arises out of a civil RICO suit Petitioners (hereinafter “GM”) filed this past November following multiple criminal pleas by employees and executives of the defendants and their co-conspirators in which they admitted to paying bribes to union officials to obtain “benefits, concessions and advantages” for and at the direction of Defendant FCA US LLC (“FCA”). Three days ago, the parties appeared (through counsel) by videoconference to present argument before the district court on several pending motions to dismiss. At the conclusion of roughly two hours of argument, Judge Borman announced that he had an order to issue. He began by announcing that he was *not* ruling on the legal issues before him and that those would be taken under advisement. He then proceeded to read an order that was divorced from both the pending legal issues and the proper concerns of an Article III judge charged with the responsibility of impartially adjudicating a federal lawsuit.

Judge Borman first admonished the parties:

This city, this state, and this country need healing. The COVID-19 pandemic, and its impact on the health of this country, requires our attention here and now!

Just as important, is our response to the tragic death of George Floyd, that has brought to the forefront the long-standing issues of racial

discrimination, and social justice, that require our attention and solution, here and now!

Order 1, Dkt. 74 (June 23, 2020).

Judge Borman then lamented that the time and resources necessary to litigate this case (which was filed long before and has nothing to do with those deadly serious, but unrelated, crises arose) “will not only divert and consume the attention of key GM and FCA executives from their day jobs, … but also prevent them from fully providing their vision and leadership on this country’s most pressing social justice and health issues.” *Id.* at 2. After emphasizing the federal aid that legally distinct former General Motors and Chrysler entities received when facing bankruptcy more than a decade ago, Judge Borman declared: “Today our country needs, and deserves, that these now-healthy great companies pay us back, by also focusing on rescuing this country and its citizens from the plagues of COVID-19, racism, and injustice, while building the best motor vehicles in the world.” *Id.*

To that apparent end, Judge Borman ordered “just the two CEOs” of GM and FCA to immediately “meet in person (social distancing) to reach a sensible resolution of this huge legal distraction.” *Id.* at 3. He further ordered “just” the CEOs, *without* their legal counsel, to personally report back to him by noon on July 1 on their progress in ensuring that their companies can “fully focus your talents on healing this country as we all embark on the critical road ahead” rather than on “this huge legal diversion” and “nuclear option” of a lawsuit. *Id.*

That unprecedented order is a profound abuse of the power and the critically important, but essentially limited, office of the federal judiciary. The health and social justice crises besetting our nation are undoubtedly issues that demand attention. But it is not within the power or properly limited office of an Article III judge charged with impartially adjudicating a federal cause of action Congress deemed worthy of judicial resources to label that action a “distraction.” Nor is it within an Article III judge’s power to order the CEOs of two major companies personally, immediately, and without the aid of counsel to meet and report to the court on their efforts to resolve complex litigation that the court, in lieu of resolving pending motions, has deemed a “waste of time and resources” that could be better put to “this country’s most pressing social justice and health issues.” *Id.* at 2-3. District courts have wide latitude to manage their dockets and encourage parties to settle. But as this Court recently reminded when granting the writ of mandamus under less egregious circumstances, latitude is not unbounded license. As in that case, the extraordinary order here is “a clear case of judicial overstep.” *In re Univ. of Michigan*, 936 F.3d 460, 466 (6th Cir. 2019). And just as in that case, this Court has both “the power and duty to” correct it. *Id.* Maintaining the appearance of impartial justice and the proper, and properly limited, role of the Article III courts demands nothing less.

JURISDICTIONAL STATEMENT

The petition arises from an order issued by the Honorable Judge Paul D. Borman in *General Motors LLC v. FCA US LLC*, No. 19-cv-13429 (E.D. Mich. filed Nov. 20, 2019).¹ This Court has jurisdiction under the All Writs Act, 28 U.S.C. §1651(a), as set forth in Rule 21 of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Whether Judge Borman clearly erred in labeling a pending federal lawsuit “a distraction” and ordering the parties’ CEOs to meet in person without any counsel present, reach a settlement (not just to endeavor to that end), and report to the court without the representation of counsel.
2. Whether Judge Borman clearly erred in prioritizing unrelated social crises over the adjudication of a properly filed and pending federal lawsuit and ordering the parties to engage in settlement discussions of that “legal diversion” for plainly impermissible purposes.
3. Whether this Court should exercise its discretion to reassign this case.

¹ The district court’s June 23 order, Dkt. 74, is attached as Exhibit A. The order was issued shortly after a hearing on the defendants’ motions to dismiss. The transcript of that hearing, Dkt. 75, is attached as Exhibit B.

STATEMENT OF THE CASE

A. GM’s Lawsuit

1. In July 2017, the U.S. Attorney for the Eastern District of Michigan filed the first of many indictments against FCA employees and executives and certain former union leaders. The indictments—which have produced more than a dozen guilty pleas and prison sentences—detailed a sprawling, years-long racketeering scheme. As the individual defendants in this case have repeatedly admitted in criminal plea agreements, senior executives and agents of FCA—with the knowledge and approval of FCA’s management, including then-CEO, Sergio Marchionne—funneled millions of dollars in “prohibited payments and things of value to UAW officers and UAW employees,” and in return received “benefits, concessions, and advantages for FCA in the negotiation, implementation, and administration of the collective bargaining agreements between FCA and the UAW.” Compl. ¶¶3 & n.2, 63, Dkt. 1 (Nov. 20, 2019); *see also id.* ¶¶5, 55-58 (scheme was directed by Marchionne and his colleagues at FCA’s parent company, Defendant Fiat Chrysler Automobiles N.V. (“FCA NV”)). FCA has disclosed in its SEC filings that it remains in settlement discussions with the U.S. Attorney for its participation in the bribery scheme that is the subject of co-Defendants’ criminal pleas and at the heart of GM’s RICO claims.

Not only was the very purpose of the bribes to obtain concessions, benefits, and advantages that would drive GM’s costs higher and otherwise render it less competitive than FCA, Compl. ¶¶71-83, but Defendants conspired with certain former UAW leaders in connection with 2015 collective bargaining in an effort to harm GM and force a FCA/GM merger by imposing more than a billion dollars in costs on GM. *Id.* ¶¶84-139, 148; *see also* Iacobelli Gov’t Sentencing Mem. 8, Dkt. 31-2 (Jan. 10, 2020) (Defendant Alphons Iacobelli agreed that he and others at FCA made illegal payments as part of “a corporate policy to buy good relationships with UAW officials,” which they believed would lead to benefits, concessions, and advantages over GM in collective bargaining).

In an understandable (and congressionally authorized) reaction to a confessed pattern of racketeering activity that targeted GM for economic injury, GM brought this lawsuit alleging claims under the RICO Act, 18 U.S.C. §1962(b)-(d), and claims for unfair competition and civil conspiracy under Michigan state law, all based on this admitted racketeering scheme.

2. The case was randomly assigned to Judge Borman, who coincidentally presided over many of the criminal proceedings against Defendants and their co-conspirators. *See, e.g., United States v. Durden*, No. 2:17-cr-20406-PDB-RSW (E.D. Mich. filed June 13, 2017). While Judge Borman’s default rules provide for discovery as a matter of course, Judge Borman deviated from those default rules by

deeming this “an extraordinarily complex case.” Order Denying Motion to Enforce Rule 26(d)(1), Dkt. 55 (Feb. 18, 2020).

Defendants FCA, FCA NV, and Iacobelli all filed separate motions to dismiss on January 24, 2020. The coronavirus pandemic broke months later, but the briefing proceeded, with GM filing its oppositions to the motions in March and Defendants filing their replies in mid-April. On May 26, 2020, Judge Borman issued a notice scheduling oral argument on Defendants’ motions to dismiss, to be held via videoconference on June 23. Notice of Hearing, Dkt. 70. On June 15—just eight days before the hearing—Judge Borman entered a two-page order dismissing both of GM’s state-law claims. Order Declining to Exercise Supplemental Jurisdiction 1, Dkt. 71. The order did not address the merits of either claim. Rather, it stated summarily that “proceeding to trial on the three specific Federal RICO claims ..., and also trying the two State law claims ..., would create insurmountable, confusing, and prejudicial spillover-evidence issues, and also create jury confusion that instructions could not cure.” *Id.* at 2.

B. The June 23 Hearing and Order

1. The hearing on Defendants’ motion to dismiss (which, given Judge Borman’s summary order dismissing the state-law claims, was limited to GM’s RICO claims) took place via Zoom on June 23. Judge Borman allowed Defendants’ argument to proceed largely on-script and uninterrupted; he asked just a single

substantive question of Defendants’ multiple counsel. Tr. of Remote Mot. Hrg. (“Tr.”) 7-28, Dkt. 75 (June 25, 2020). In stark contrast, Judge Borman asked GM’s lone representative more than two dozen questions, many (if not most) having nothing to do with the facts and claims or the 12(b)(6) procedural posture.

For instance, less than a minute into GM’s argument, Judge Borman asked counsel to account for “the benefits” GM had received under “the TARP rescue program.” *Id.* at 29:19–30:4. Issues regarding the 2008 financial crisis and its aftermath obviously are unrelated to the sufficiency of GM’s RICO allegations—and not just because the entity that received TARP funds more than a decade ago is distinct from GM and not a party to this case. Judge Borman asked other questions premised on facts outside the pleadings, such as whether GM had “vetted” one Defendant before hiring him and “knew he was driving a 300 and something thousand dollar car.” *Id.* at 32:11-13. Judge Borman also questioned GM’s motives in filing suit, suggesting GM’s lawsuit was a “nuclear situation” brought to “destroy” a competitor. *Id.* at 53:8-18, 23-25.

2. The questioning at the hearing was unusual, but nothing compared to the extraordinary order that followed. At the conclusion of the argument concerning the motions to dismiss, Judge Borman stated that the court was “taking” those matters “under advisement.” *Id.* at 64:25. He then read a previously prepared

statement, which he later memorialized in a written order that is the subject of this mandamus petition.²

The order does not address the sufficiency of GM’s allegations or the merits of GM’s claims. It instead deems the entirety of a properly filed federal lawsuit assigned to Judge Borman for impartial adjudication a “huge legal distraction” and “waste of time and resources” based on (a) the “pressing social justice and health issues” facing the country, and (b) the time it would take to prosecute GM’s claims.

The order begins:

The world has changed dramatically since this case was filed on November 20, 2019. This city, this state, and this country need healing.

The COVID-19 pandemic, and its impact on the health of this country, requires our attention here and now!

Just as important, is our response to the tragic death of George Floyd, that has brought to the forefront the long-standing issues of racial discrimination, and social justice, that require our attention and solution, here and now!

Order 1.

The order then makes clear that, in Judge Borman’s view, this case—which is based almost entirely on federal criminal conduct that Defendants concededly committed long before the current crises—is a “waste of time and resources”:

If this case goes forward, there will be years of contentious litigation; motion hearings, multiple-day depositions of large numbers of executives and former executives, at GM and FCA, as well as United

² All citations are to the written version of the order, Dkt. 74.

Auto Workers (UAW) officials, other Defendants, many third parties, and a plethora of RICO, labor law, and damages experts.

These “legalities” will not only divert and consume the attention of key GM and FCA executives from their “day jobs”—issues of vehicle production, sales, worker safety, roll-outs, supplier issues, etc.—but also prevent them from fully providing their vision and leadership on this country’s most pressing social justice and health issues.

Id. at 2.

The order then emphasizes that GM—which did not exist in 2008—needs to “pay us back” for the “billions of dollars in aid” it received from the federal government “[i]n 2008” by joining together with FCA to help resolve racial and social justice issues rather than litigating. *Id.* In light of these “pressing social justice and health issues” and the “years of contentious litigation” GM’s claims would entail, which would “divert and consume the attention of key GM and FCA executives from their ‘day jobs,’” the order labels GM’s lawsuit filed pursuant to duly enacted federal laws and assigned to Judge Borman for impartial adjudication “a waste of time and resources.” *Id.* at 2-3.

Accordingly—and in light of impressions of their abilities and priorities gleaned “[w]hile watching television news”—Judge Borman ordered the CEOs of GM and FCA to meet in-person, “reach a sensible resolution of this huge legal distraction,” then report the results by July 1—*outside the presence of counsel*:

I am ordering that no later than July 1, 2020, just the two CEOs, Mary Barra and Michael Manley, meet in person (social distancing), to reach a sensible resolution of this huge legal distraction. This will enable you

personally, and your companies to fully concentrate ... on providing the leadership and vision this country requires, and deserves, in solving today's aforementioned critical issues.

Time is of the essence. So, I repeat; Mary Barra and Michael Manley, meet face-to-face, in good faith, and with good will, to resolve this huge legal diversion, to permit you and your companies to also fully focus your talents on healing this country as we all embark on the critical road ahead.

I request that I hear from just both of you personally, on a teleconference or a Zoom webinar (no need for both to be physically present in the same room on this occasion) at noon on Wednesday, July 1, 2020 to provide me with the results of your discussions.

Id. at 3-4.

Judge Borman subsequently confirmed via email that the order's limitation to "just the two CEOs" means what it says: No one but the CEOs—not outside counsel, not each party's general counsel, not anyone—may participate *either* in the "face-to-face" settlement conference *or* in the subsequent July 1 teleconference or webinar. Judge Borman further confirmed that the July 1 conference will be open to the public—meaning that the news media, interested parties, and all others will be able to watch the parties' CEOs appear in court without the assistance of counsel.

STANDARD OF REVIEW

The All Writs Act permits this Court to "issue all writs necessary or appropriate in aid of" its jurisdiction. 28 U.S.C. §1651(a). The writ of mandamus is an extraordinary remedy used to confine a lower court to the lawful exercise of its jurisdiction. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). Issuance

of the writ is “appropriate to remedy a clear abuse of discretion or judicial usurpation of power.” *Univ. of Michigan*, 936 F.3d at 466. Mandamus relief is warranted when (1) the “right to issuance of the writ is clear and indisputable,” (2) the petitioner has “no other adequate means” of obtaining relief, and (3) “the writ is appropriate under the circumstances.” *Cheney*, 542 U.S. at 380-81. Those requirements, “however demanding, are not insuperable.” *Id.* at 381. Indeed, mandamus relief recognizes that the actions of federal courts demand authorization from Congress or the Constitution and that the limits of those authorizations can be exceeded. *See Univ. of Michigan*, 936 F.3d at 466.

This Court has adopted a flexible approach to determining when mandamus is warranted, considering several non-exclusive factors such as the absence of “other adequate means” to “attain the relief desired”; damage or prejudice “not correctable on appeal”; and whether an order is “clearly erroneous as a matter of law,” contains an “oft-repeated” error or “manifests a persistent disregard of the federal rules,” or “raises new and important problems, or issues of law of first impression.” *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984). This Court has “never required that every element be met in order for mandamus to issue” and has stressed that the mandamus analysis “cannot be wholly reduced to formula.” *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005). Mandamus is particularly important to police the proper separation of powers and the limits on judicial authority. *Cheney*,

542 U.S. at 380-83. This Court possesses the discretion to order a case reassigned on remand to preserve the appearance and reality of impartiality. *See Rorrer v. City of Stow*, 743 F.3d 1025, 1049-51 (6th Cir. 2014).

ARGUMENT

I. The District Court’s Order Is Clearly Erroneous.

The district court’s extraordinary order bears no relation to any order concerning an ordinary settlement conference and plainly exceeds the limits on the court’s authority. It requires “just the two CEOs” of GM and FCA to “meet in person,” *without* their respective legal counsel, and purports to further require them to “reach a sensible resolution of this huge legal distraction”—the court’s label for GM’s pending federal lawsuit assigned to Judge Borman for impartial adjudication. Order 3. The order further requires “just” the two CEOs, again without counsel, to appear before the court just eight days later and announce the “results” of their “discussions.” *Id.* at 3-4. Forcing the CEOs to resolve “this huge legal diversion” in eight days or less, the court avers, will free GM and FCA to focus not only on “building the best motor vehicles in the world,” but also on “rescuing this country and its citizens from the plagues of COVID-19, racism, and injustice.” *Id.* at 2-3. By doing so, GM and FCA can “pay” the country “back” for the federal aid automakers received in the wake of the Great Recession. *Id.* at 2.

That order is “a clear case of judicial overstep.” *Univ. of Michigan*, 936 F.3d at 467. *First*, the court possesses no authority to order the CEOs of GM and FCA to engage in settlement discussions, reach a resolution, and then appear alone at a pretrial conference eight days later, *without counsel*. *Second*, the court has no business labeling a properly filed federal lawsuit assigned to the court for impartial adjudication “a distraction” or a “nuclear option,” and it cannot force the parties to settle a cause of action Congress deemed worthy of judicial attention so that they can focus instead on “rescuing this country” from assorted health and social evils.

Order 2-3. In the words of a recent decision granting mandamus in similar, though less egregious, circumstances: “Either of these actions alone may warrant mandamus. Together, they certainly do.” *Univ. of Michigan*, 936 F.3d at 466 (emphasis omitted).

A. The District Court Lacks Authority to Coerce Settlement, Dictate CEO Involvement, and Restrict Counsel.

The Federal Rules of Civil Procedure “provide tools to manage a busy docket, including the valuable tool of encouraging parties to settle when appropriate.” *Id.* at 463. Under Rule 16, a district court may order “the attorneys” in “any action” to “appear for one or more pretrial conferences” for various purposes, including “facilitating settlement.” Fed. R. Civ. P. 16(a)(1). Eastern District of Michigan Local Rule 16.1(c) similarly requires parties to be represented at pretrial conferences “by at least one attorney who will participate actively in the trial of the action, and

who has information and authority adequate for responsible and effective participation for all purposes, including settlement.” Rule 16 conveys the importance of counsel at such pretrial conferences by directing represented parties to authorize their attorneys to make stipulations and admissions about matters that can reasonably be anticipated for discussion, *id.* (c)(1), and by empowering the district court to impose sanctions for an attorney’s failure to appear at a conference or to participate in good faith, *id.* (f).

To facilitate settlement, Rule 16 provides that, where “appropriate,” the district court may *also* require a party itself, or its representative—in addition to its attorney—to be “present or reasonably available by other means” at a pretrial conference “to consider possible settlement.” *Id.* (c)(1). This Court has understood that provision to “generally allow a district court to order someone with settlement authority to attend a settlement conference.” *Univ. of Michigan*, 936 F.3d at 464 (citing *In re LaMarre*, 494 F.2d 753, 756 (6th Cir. 1974)); *see also* E.D. Mich. L.R. 16.6 (court may require someone with ultimate settlement authority to attend a settlement conference). The Rule 16 Advisory Committee Notes emphasize, however, that the “selection of the appropriate representative” in those circumstances “should ordinarily be left to the party and its counsel.” Fed. R. Civ. P. 16 Advisory Committee Notes (1993 Amendments); *see also, e.g., United States v. U.S. Dist. Court for N. Mariana Islands*, 694 F.3d 1051, 1060 (9th Cir. 2012)

(court's authority to order party itself to appear at settlement conference "should be exercised with awareness of the institutional posture of the particular parties involved"); Wright & Miller, Procedural Aspects of the Pretrial Conference—Powers of the Pretrial Judge, 6A Fed. Prac. & Proc. Civ. §1525.1 (3d ed.) (power to require party participation in settlement conference "should be invoked with great care so that it does not become unduly burdensome or coercive").

Notably missing from the Rule 16 toolbox are the powers the district court purported to exercise here: ordering at the outset of the case without the exhaustion of the normal tools of settlement (or even the resolution of threshold questions of personal jurisdiction) (i) the *two CEOs themselves* (ii) to engage in settlement discussions, *reach a resolution*, and report back at a pretrial conference *within* eight days and (iii) *without* counsel.

First, the district court radically abused its discretion by labeling a pending lawsuit a "distraction" and "waste of time" and ordering the two CEOs themselves to negotiate a prompt settlement and report to the court in a week. Although Rule 16 grants district courts general power to compel *someone* with settlement authority to attend a settlement conference, it confines that power to "appropriate" circumstances and ordinarily permits the parties to decide for themselves which corporate representative to send, particularly in the early stages of a case where the possibility of settlement is more distant. Fed. R. Civ. P. 16(c)(1); *see id.* Advisory

Committee Notes (1993 Amendments); *U.S. Dist. Court for N. Mariana Islands*, 694 F.3d at 1060.

Ignoring those principles, the district court leaped straight to the top in ordering the highest-ranking officers of GM and FCA to not only appear alone at a settlement conference, but actually negotiate the settlement themselves, without counsel, and personally report back to the court just eight days later. The court did so at an early stage of the case, with motions to dismiss pending, without exhausting any more conventional settlement options, after denying them the ordinary opportunity to proceed with discovery, and after labeling a duly filed and pending federal lawsuit a distraction and waste of time. The court's demand for the CEOs' personal attention was expressly premised on impressions of the CEOs' capabilities and priorities gleaned from the "television news." Order 2. The district court's impressions based on extra-record materials that the CEOs are capable of "join[ing] together" to "provide some attention, leadership and skills to solving social and economic issues," *id.*, have nothing to do with the likelihood of successful settlement at this stage (or any stage) of the litigation and are a wholly inappropriate basis for departing from the ordinary rules that govern settlement proceedings.

Worse still, while the district court may urge the parties to settle if it believes settlement would be expedient, *see In re Nat'l Prescription Opiate Litig.*, No. 19-3935, 2019 WL 7482137, at *2 (6th Cir. Oct. 10, 2019), it possesses no authority to

coerce a settlement. A wall of precedent underscores that courts may not use “pressure tactics” to “coerce” parties into settlement. *Kothe v. Smith*, 771 F.2d 667, 669-70 (2d Cir. 1985); *see also*, e.g., *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1128 (3rd Cir. 1990); *In re Ashcroft*, 888 F.2d 546, 547 (8th Cir. 1989). The district court’s order violated those long-established principles both implicitly and expressly. The court not only coerced a settlement by labeling the suit a “distraction” and a “nuclear option,” but also affirmatively ordered the two CEOs to “*reach a sensible resolution* of this huge legal distraction” and then report back to the court with the “results.” Order 3-4 (emphasis added); *see also* Tr. 67:22-24 (ordering CEOs “to explore *and, indeed, reach* a sensible resolution of this huge legal distraction” (emphasis added)). That aspect of the order plainly oversteps any legitimate judicial role in merely facilitating settlement.

Finally, the district court manifestly possesses no power to order parties to negotiate a settlement *without the assistance (or even the presence) of counsel* and appear—again without the aid of any legal representation—at a settlement conference that will be open to the public. Although it should not be necessary to mine the language of Rule 16 to reach that obvious conclusion, the rule plainly does not contemplate such power. If a party is represented by counsel, Rule 16 generally authorizes the district court to order *only* “the attorneys” to appear at a pretrial conference, and it instructs represented parties to authorize their “attorneys” to make

stipulations and admissions at pretrial conferences. Fed. R. Civ. P. 16(a), (c)(1). For the purpose of facilitating settlement discussions in particular, Rule 16 permits the court to order a party or its representative to *also* appear at a pretrial conference when appropriate, but it nowhere remotely suggests that the court may order a represented party to appear *without counsel*.

That Rule 16 does not authorize such a novel arrangement should come as no surprise. Ordering represented parties to appear at pretrial proceedings without the presence of counsel would not only create a “risk of prejudicial revelations of evidence or strategy,” but also be “contrary to our system of advocacy.” *In re Air Crash Disaster at Stapleton Int’l Airport*, 720 F. Supp. 1433, 1438 (D. Colo. 1988). Rule 16 allows courts a fair amount of leeway to manage their dockets, but it does not permit them to undermine our entire model of adversarial litigation by cutting parties off from the attorneys engaged to represent them. Nor, more generally, does it authorize judicial adventurism at the expense of parties’ ordinary rights in litigation. Cf. *In re Nat’l Prescription Opiate Litig.*, 956 F.3d 838, 844-45 (6th Cir. 2020) (district court’s “mistake” was “to think it had authority to disregard” the Federal Rules “in favor of enhancing the efficiency” of a proceeding “as a whole”).

In short, the district court’s order compelling the *CEOs themselves to reach a settlement* and then “report back” in front of the public but *without counsel*, and to do all that within eight days, flatly contradicts Rule 16 and departs from bedrock

principles of civil litigation. It easily constitutes the kind of clear and unmistakable error that warrants the strong remedy of mandamus.

Indeed, this Court has already granted mandamus to correct comparable—if anything, *less* fundamental—judicial error. In *University of Michigan*, the district court ordered the University’s president to attend a settlement conference, even though the University had offered to send a different representative with full settlement authority. The court also ordered that the settlement conference be open to the public. The University sought a writ of mandamus, arguing that the district court had exceeded the bounds of its authority under Rule 16 by compelling a high-ranking state official to serve as the University’s representative at the public settlement conference. This Court agreed, reasoning that neither the district court’s “understandable desire to settle the case” nor its view that the president had a “duty to explain University policy to his constituents” justified the court in compelling the president to attend when the University was prepared to send someone else who more than fulfilled the requirements of Rule 16. 936 F.3d at 464. The Court further concluded that the district court plainly lacked the power “to order a forced *public* settlement conference where the University’s principal executive is held to account.” *Id.* (emphasis added).

The district court’s abuse of its powers in this case is even more patent. In *University of Michigan*, the court exceeded its authority to order a party to attend a

settlement conference deep into litigation after previous efforts had failed. *Id.*; see Fed. R. Civ. P. 16(c). Here, the court committed comparable excesses at the very outset of the litigation, without exhausting alternatives or even confirming its jurisdiction over all the parties, and then went several steps further by purporting to exercise powers it *does not possess at all*: the power to compel the parties to actually reach a settlement, and to engage in settlement discussions and appear at a public settlement conference *without counsel*. And on top of all that, the court insisted that all that happen *within eight days*. Moreover, the court did all that not in service of impartially resolving a dispute, but only after insisting that outside events justified departure from the normal order, and only after labeling a duly filed federal lawsuit assigned to the judge for impartial adjudication a massive “distraction” from more pressing issues extraneous to the lawsuit.

The consequences of that error are at least as grave as in *University of Michigan*. There, compelling the president of a state university to attend a public settlement conference in federal court would have threatened to upset the “delicate balance in the area of federal-state relationships.” 936 F.3d at 465. The extraordinary order here and the requirement that the CEOs appear at a public hearing without the aid of counsel upset not only the delicate balance between the legislative and judicial branches (in which the former determines which federal causes of action are sufficiently important to justify the courts’ attention), but the

basic Anglo-American model of adversarial litigation (in which the parties litigate before impartial federal courts, with each side represented by counsel throughout the life of a lawsuit). It also exercises authority in a way that is not only verboten, but antithetical to the legitimate interests in settlement. In short, in superimposing his own priorities over those of Congress and the parties and blithely discarding the basic adversarial and representative model of adjudication, the district judge plainly overstepped in a manner that cries out for mandamus.

B. The District Court Lacked Authority to Order Settlement to Refocus on Other Priorities or in Light of Perceived Equities from Unrelated Federal Legislation.

In addition to specifying who must attend pretrial conferences, Rule 16 provides “enumerated purposes” and lists “matters for consideration at pretrial conferences.” *Univ. of Michigan*, 936 F.3d at 464. Nowhere in Rule 16 (or anywhere else in the Federal Rules) is a district court empowered to order parties to settle to pay society back for unrelated federal legislation or to refocus on more pressing matters of public health or social justice. Yet that is what the district court unabashedly did here.

In the court’s view, because legally distinct GM and Chrysler entities previously received federal aid dollars, GM and FCA are in a position of public trust and are therefore expected not only to build “the best motor vehicles in the world,” but also to rid the country of various health and social evils, including “the plagues

of COVID-19, racism, and injustice.” Order 2. Needless to say, tackling the daunting health and social justice problems facing this nation are of paramount importance to GM. But tackling those problems and remedying criminal conduct pursuant to a congressionally authorized cause of action are not mutually exclusive. And when a party validly invokes such a cause of action, the proper role of a federal court assigned to adjudicate the matter impartially is to do just that—not to second-guess the parties’ priorities or Congress’ wisdom in creating federal jurisdiction, or to impose heightened burdens on certain companies in a manner in serious tension with the non-discrimination provisions of the Bankruptcy Code or trying to shame litigants into not pursuing their legal rights, *see* 11 U.S.C. §525.

Although judges in complex litigation are free to “pursue and facilitate settlement early in a variety of ways,” they cannot order settlement conferences for the wrong reasons—as a result of bias, for example, or prejudgment of the case. *In re Nat'l Prescription Opiate Litig.*, 2019 WL 7482137, at *3. Nothing about the district court’s order suggests that the court thought this case was ripe for settlement based on normal considerations within the four corners of this litigation. Indeed, the court’s order is explicit that it views the current situation as justifying a deviation from the normal order. The court’s demand that the CEOs meet to settle the case was not a product of a proper consideration of the merits, the results of discovery, or the limitations of prior settlement efforts. Instead, the court quite literally pre-judged

the case by simultaneously declining to resolve the pending motions to dismiss and yet still disparaging the underlying lawsuit as a “diversion,” a “waste of time and resources,” and a “huge legal distraction.” Order 3. Combined with the one-sided nature of the questioning during the hearing, it is hard to understand the court’s order as anything other than a brazen and highly inappropriate effort to shame Plaintiffs into settling a lawsuit that Congress deemed worthy of a federal court’s time and attention.

The court’s order buttresses its extraordinary demands with a theory that GM and FCA somehow owe a special duty to the public to “rescue” the country from ills unrelated to auto manufacturing because they previously received federal bailout funds. That observation is factually mistaken and legally flawed and irrelevant. In reality, the entities that received the benefits of federal aid or the protections of bankruptcy are not before the court. Plaintiffs not only did not receive federal bailout funds in 2008; they did not exist in 2008. But in all events, entities that emerge from bankruptcy are statutorily entitled to a fresh start, and do not suffer from any lingering disabilities not specified in statute. *See, e.g., In re Schafer*, 689 F.3d 601, 613 (6th Cir. 2012). And certainly nothing in Defendants’ past gives them any special immunity from federal criminal law or the civil RICO remedies that Congress has provided for victims of racketeering activity.

That reality is at the heart of the district court’s overreach. In our system of separation of powers, it is for Congress to determine which federal causes of action merit the time and attention of the federal courts. It is not for an individual judge to determine that in light of more pressing issues, a duly authorized federal cause of action is a “distraction” and not worth the time and resources needed to litigate it. If the court had dismissed this case not based on the merits but based on its assessment that it was a waste of time and resources given the nation’s more pressing problems, it would be a clear usurpation of power and obviously reversible. Ordering unprecedented and unauthorized settlement efforts on the same rationale is no less justified and should suffer the same fate.

II. Mandamus Is Appropriate.

A. GM Has No Other Means to Obtain Relief.

Mandamus relief is appropriate when the “party seeking the writ has no other adequate means, such as direct appeal” to obtain relief. *In re Lott*, 424 F.3d at 449. That is plainly the case here. The order does not satisfy the criteria for a discretionary interlocutory appeal under 28 U.S.C. §1292(b). Nor is defiance of the order and appeal of any resulting contempt order an adequate alternative legal remedy. See *In re NLO, Inc.*, 5 F.3d 154, 159 (6th Cir. 1993). GM therefore “has no other … legal remedy.” *Univ. of Michigan*, 936 F.3d at 466 (emphasis omitted); see also, e.g., *U.S. Dist. Court for N. Mariana Islands*, 694 F.3d 1051.

B. Absent Mandamus, GM Will Suffer Harm Not Correctable on Appeal.

Mandamus is also appropriate “when a party is in danger of harm that cannot be adequately corrected on appeal.” *In re Life Inv’rs Ins. Co. of Am.*, 589 F.3d 319, 323 (6th Cir. 2009). That is likewise the case here. By defying the rule that “the court may not order the appearance of represented parties at pretrial proceedings without the presence of counsel,” the order will force GM to “bear the risk of prejudicial revelations of evidence or strategy” that might easily occur at a settlement conference not attended by counsel. *In re Air Crash Disaster*, 720 F. Supp. at 1438. That risk is compounded by the fact that the GM and FCA CEOs will be witnesses in the underlying lawsuit. And once a revelation of evidence or strategy occurs at a counsel-free settlement discussion or conference, “there is no way to unscramble the egg.” *In re Ford Motor Co.*, 110 F.3d 954, 963 (3d Cir. 1997), abrogated on other grounds by *Mohak Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009). Each side will “use such material for evidentiary leads, strategy decisions, or the like.” *Id.*

Courts have not hesitated to find a manifest abuse of discretion when a district court’s case management device “requires parties to disclose particular strategies or evidence which would prejudice their presentations at trial.” *In re Air Crash Disaster*, 720 F. Supp. at 1437 (collecting cases). The same reasoning should apply when a court’s case management device creates a substantial risk of such prejudice, which cannot be corrected on appeal.

The impossibility of correcting this error on appeal is highlighted by the extraordinary time pressures the order imposes on the CEOs. It orders them not only to meet personally to resolve complex litigation, but to do so and report back to court within just eight days. That incredibly compressed schedule not only makes correction on appeal impossible, but makes it difficult for this Court to have the time to consider this mandamus petition. Accordingly, this Court should grant this petition urgently, or at least stay the order pending this Court's consideration of this petition given the impending July 1 pretrial conference.³

C. The District Court's Order Raises New and Important Problems for this Court's Review.

Finally, mandamus is appropriate because the order raises “new and important problems” that warrant immediate intervention. *In re Bendectin Products Liability Litig.*, 749 F.2d at 304. This extraordinary order is concededly “new”—Judge Borman expressly departed from the normal order based on the new and unprecedeted crises facing the nation—and self-evidently important, as it raises questions that go to the heart of the separation of powers and our adversarial and representative system. Not surprisingly, this Court does not appear to have previously addressed whether a court may order represented parties to engage in

³ As this petition arises under the All Writs Act, this Court has the power to issue a brief stay while it considers the petition. *See Nken v. Holder*, 556 U.S. 418, 426-27 (2009).

settlement discussions and attend a settlement conference without counsel—let alone do so on the theory that these “not ordinary” days make litigation a “waste of time and resources” that could be put to better use. That itself is a telling sign that the order profoundly jumped the tracks. But that aside, given the fundamental nature of these issues, which go to the heart of our basic model of adversarial litigation, it would be appropriate for this Court to correct the district court’s manifest error and make clear that a district court’s powers to encourage settlement are not boundless and that a district court cannot second-guess Congress’ determination that a federal cause of action is worthy of the court’s and the litigants’ attention.

III. The Court Should Exercise Its Discretion To Reassign This Case.

The same considerations that make mandamus an appropriate and necessary response to the district court’s extraordinary order also warrant reassignment. “This Court possesses the power, under appropriate circumstances, to order the reassignment of a case on remand pursuant to 28 U.S.C. §2106.” *Rorrer*, 743 F.3d at 1049. Three factors are relevant in determining whether reassignment is warranted:

- (1) whether the original judge would reasonably be expected to have substantial difficulty in putting out of his or her mind previously expressed views or findings;
- (2) whether reassignment is advisable to preserve the appearance of justice; and

(3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United States ex rel. Williams v. Renal Care Grp., Inc., 696 F.3d 518, 532-33 (6th Cir. 2012). All three factors readily support reassignment here, as Judge Borman has taken extraordinary actions that make manifestly clear what he thinks about this litigation even at this early stage.

Given the extraordinary nature of his order and reasoning, that order is not a matter that either Judge Borman or any neutral observer of the proceedings can be expected to put out of mind. Since Judge Borman has already deemed GM’s entire lawsuit a “distraction” and “waste of time and resources,” there is no feasible way to preserve the appearance of impartiality as this case proceeds. And because all of this preceded discovery and resolution of motions to dismiss, there is no material risk of waste or duplication. Under the circumstances, this Court would be well within its rights to reassign this case and ensure that GM will receive both the appearance and the reality of a fair opportunity to litigate its claims.

This Court’s decision in *Rorrer* is instructive. The district court judge there started off the case by entering “one-sided” discovery orders against the plaintiff and then proceeded to “scold[]” the plaintiff for “permissible” “behavior” “and accuse[] [him] of attempting to ‘sandbag’ Defendants.” 743 F.3d at 1049-51. This Court ultimately concluded that “the district court judge’s statements indicate that allowing

the same district judge to preside over this case on remand would compromise ‘the appearance of justice.’” *Id.* at 1050.

That reasoning applies here *a fortiori*. Judge Borman began the case by departing from his own Practice Guidelines and denying GM the opportunity to commence with discovery (which is the “usual practice” in the district “despite a pending motion to dismiss,” *e.g., Flagg v. City of Detroit*, No. 05-74253, 2008 WL 787039, at *3 (E.D. Mich. Mar. 20, 2008)), *see Order*, Dkt. 55 (Feb. 18, 2020). He then proceeded to dismiss all of GM’s state-law claims in a two-page order that did not discuss the merits at all. *See supra* p.7. And at the June 23 hearing, he gave Defendants free rein while barraging GM’s counsel with questions, conflating GM with a defunct entity with a similar name, suggesting that GM “owes” it to the court and the country not to spend time or resources on litigation, and deriding GM’s entire case as a “huge legal distraction.” *See supra* pp.7-11 (quoting Order 3).

To say “the district judge’s statements” here “are problematic,” *Rorrer*, 743 F.3d at 1050, would be a considerable understatement. Judge Borman relied on extra-record materials ranging from the “nightly news” to misperceptions about unrelated government actions. He then branded the entire lawsuit a “distraction” and “waste of resources.” It would have been one thing if Judge Borman had *only* conflated GM with a different entity, or *only* suggested that the auto industry “owed” the public. *But see, e.g., Haines v. Liggett Grp. Inc.*, 975 F.2d 81 (3d Cir. 1992)

(reassigning case after judge made sweeping and incorrect comments about party's industry). It likewise might have been different if he had *only* engaged in one-sided questioning at the June 23 hearing. Indeed, this case might look considerably different if his comments disparaging the litigation as a "distraction" had been tied *at all* to the merits, instead of to matters having nothing to do with this litigation. But that is not this case. Judge Borman has made clear what he thinks about this litigation: Regardless of its merits, it is a "waste of time and resources" that could be better put to "this country's most pressing social justice and health issues." Order 2. To suggest that GM could still receive either the appearance or the reality of a fair day in Judge Borman's court after those comments would be to blink reality.

While reassignment is an extraordinary remedy, everything about the district court's actions are extraordinary. Indeed, the order is premised on the need to depart from the normal order in light of the extraordinary crises facing the nation. But, in reality, adhering to the bedrock guarantees of fair and impartial adjudication is even more important in a crisis. Congress has determined that engaging in a pattern of racketeering activity merits not only criminal remedies but civil remedies to compensate the victims of racketeering activity. Here, in light of various criminal pleas, there is little debate about whether Defendants engaged in racketeering. But rather than decide whether the additional prerequisites to a civil RICO remedy were adequately alleged, Judge Borman decided the whole matter was a distraction

unworthy of the resources of the court or the parties. That decision is inexplicable unless the judge has prejudged the merits or second-guessed Congress' judgment in providing a federal cause of action. Neither is permissible. Judge Borman's statements and actions "indicate that allowing the same district judge to preside over this case on remand would compromise 'the appearance of justice.'" *Rorrer*, 743 F.3d at 1050 (quoting *Renal Care Grp.*, 696 F.3d at 532). Reassignment is the best way to ensure that GM's serious claims will receive both the appearance and the reality of the fair and serious consideration to which they are entitled.

CONCLUSION

For the foregoing reasons, this Court should grant mandamus, vacate the order, and reassign this case.

Respectfully submitted,

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June 26, 2020

CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because it contains 7,794 words, excluding the parts exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b).
2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font.

Date: June 26, 2020

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system.

I further certify that the foregoing was served by electronic mail and Federal Express upon the following Counsel:

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s/Paul D. Clement
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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GENERAL MOTORS LLC,
GENERAL MOTORS COMPANY,

Plaintiffs,

Case No. 19-cv-13429

v.

District Judge Paul D. Borman

FCA US LLC, FIAT CHRYSLER
AUTOMOBILES N.V., ALPHONS
IACOBELLI, JEROME DURDEN,
MICHAEL BROWN,

Defendants. /

ORDER: JUNE 23, 2020

I am taking this case under advisement, and if necessary, of course, I will be prepared to rule.

But, because today, like every day now, is not an ordinary day, I am entering this Order.

The world has changed dramatically since this case was filed on November 20, 2019. This city, this state, and this country need healing.

The COVID-19 pandemic, and its impact on the health of this country, requires our attention here and now!

Just as important, is our response to the tragic death of George Floyd, that has brought to the forefront the long-standing issues of racial discrimination, and social justice, that require our attention and solution, here and now!

If this case goes forward, there will be years of contentious litigation; motion hearings, multiple-day depositions of large numbers of executives and former executives, at GM and FCA, as well as United Auto Workers (UAW) officials, other Defendants, many third parties, and a plethora of RICO, labor law, and damages experts.

These "legalities" will not only divert and consume the attention of key GM and FCA executives from their "day jobs"--issues of vehicle production, sales, worker safety, roll-outs, supplier issues, etc.--but also prevent them from fully providing their vision and leadership on this country's most pressing social justice and health issues.

In 2008, and going forward, the Federal Government focused on rescuing GM and Chrysler, by providing billions of dollars in aid. That saved GM and Chrysler, now FCA, and tens of thousands of UAW auto workers' jobs. Today our country needs, and deserves, that these now-healthy great companies pay us back, by also focusing on rescuing this country and its citizens from the plagues of COVID-19, racism, and injustice, while building the best motor vehicles in the world.

While watching television news, I have seen CEOs Mary Barra of GM, and Michael Manley of FCA join together, time and again (often with Bill Ford) to provide some attention, leadership and skills to solving social and economic issues

for the good of their companies, their workers, their communities, and our country. So too, I have noticed some attorneys devoting their skills to provide equal justice for all citizens, in particular those less fortunate who require representation in our courts.

What a waste of time and resources, now and for the years to come in this mega litigation, if these automotive leaders and their large teams of lawyers, are required to focus significant time-consuming efforts to pursue this "nuclear option" lawsuit, if it goes forward.

I am ordering that no later than July 1, 2020, just the two CEOs, Mary Barra and Michael Manley, meet in person (social distancing), to reach a sensible resolution of this huge legal distraction. This will enable you personally, and your companies to fully concentrate, in addition to your "day jobs", not just through committees, on providing the leadership and vision this country requires, and deserves, in solving today's aforementioned critical issues.

Time is of the essence. So, I repeat; Mary Barra and Michael Manley, meet face-to-face, in good faith, and with good will, to resolve this huge legal diversion, to permit you and your companies to also fully focus your talents on healing this country as we all embark on the critical road ahead.

I request that I hear from just both of you personally, on a teleconference or a Zoom webinar (no need for both to be physically present in the same room on

this occasion) at noon on Wednesday, July 1, 2020 to provide me with the results of your discussions.

Thank you for your attention to this Order.

SO ORDERED.

DATED: June 23, 2020

s/Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

**GENERAL MOTORS LLC,
GENERAL MOTORS COMPANY,**

Plaintiffs,

HONORABLE PAUL D. BORMAN

No. 19-13429

FCA US LLC, FIAT CHRYSLER
AUTOMOBILES N.V., ALPHONS
IACOBELLI, JEROME DURDEN,
MICHAEL BROWN,

Defendants.

/

REMOTE MOTION HEARING - DEFENDANTS' MOTIONS TO DISMISS

BEFORE JUDGE PAUL D. BORMAN
United States District Judge
231 West Lafayette Boulevard
Detroit, Michigan
Tuesday, June 23, 2020
10:02 a.m.

APPEARANCES:

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DEFENDANTS' MOTIONS TO DISMISS

4 (Call to order of the Court, 10:02 a.m.)

5 THE LAW CLERK: The United States District Court is
6 now in session; the Honorable Paul D. Borman presiding. Court
7 call -- the Court calls Case Number 19-1329.

THE COURT: No, 134 --

THE COURT CLERK: 13429, GM versus FCA.

10 THE COURT: Okay. So just to complete, this is
11 General Motors LLC, General Motors Company, plaintiffs, versus
12 FCA US LLC, Fiat Chrysler Automobiles N.V., Alphons Iacobelli,
13 Jerome Durden and Michael Brown.

14 I'm Judge Paul Borman. I have been assigned this
15 case. Can the lawyers hear me? Let's start --

16 MR. HOLLEY: Yes, Your Honor.

17 THE COURT: Let's start with Mr. Willian.

18 MR. WILLIAN: Yes, Your Honor. I can hear you fine.

19 THE COURT: Is that the correct pronunciation, sir?

20 MR. WILLIAN: It is, Your Honor. Thank you.

THE COURT: Okay. Mr. Haley? Holley, sorry.

22 MR. HOLLEY: Good morning, Your Honor. I can

23 very well. Thank you.

24 THE COURT: V

25 Is it pronounced Nedel

DEFENDANTS' MOTIONS TO DISMISS

5

1 MR. NEDELMAN: Nedelman, Your Honor.

2 THE COURT: Nedelman. Okay. Can you hear me?

3 MR. NEDELMAN: Yes, Your Honor.

4 THE COURT: And Mrs. Lizza, you can hear us all?

5 THE REPORTER: I can.

6 THE COURT: Okay. The Court notes that Defendants
7 Brown and Durden join in FCA's motion to dismiss. With me on
8 this Zoom webinar are my courtroom deputy, Deborah Tofil; my
9 law clerk, Maura Allen; and my court reporter, Leann Lizza.

10 Mrs. Lizza has the toughest job, so counsel must and
11 will speak slowly and loudly.

12 So would the counsel again please identify themselves
13 for the record beginning with General Motors.

14 MR. WILLIAN: Yes, good morning. This is Jeff
15 Willian. I represent the plaintiffs in this case.

16 THE COURT: Thank you, sir.

17 FCA and FCA N.V.?

18 MR. HOLLEY: Yes, Your Honor. Steven Holley,
19 H-O-L-L-E-Y, from Sullivan & Cromwell for the defendants, FCA
20 US LLC and Fiat Chrysler Automobiles N.V.

21 THE COURT: Thank you.

22 And for Mr. Iacobelli.

23 MR. NEDELMAN: Good morning, Your Honor. Michael
24 Nedelman appearing on behalf of Alphons Iacobelli.

25 THE COURT: Thank you.

DEFENDANTS' MOTIONS TO DISMISS

1 Before we begin, I want to make three personal
2 disclosures. About 20 years ago I attended a week-long seminar
3 at which Tom Gottschalk, then GM's general counsel, now I've
4 heard is back at Kirkland & Ellis, attended and spoke. In
5 subsequent years, while still serving as GM's general counsel
6 in Detroit, I would run into him on occasion and exchange
7 pleasantries. I have not seen or spoken to Tom in more than
8 ten years.

9 Second, in 2010 when Ed Whitacre was GM's CEO, a Texas
10 district judge friend whose wife was on the Texas Tech Board
11 with Ed called to suggest that since Ed was away from home in
12 Detroit I should give him some local hospitality. We met for
13 lunch, each paid his own check and it was very enjoyable. I
14 have not spoken to Ed or seen him since then.

15 Finally, about three days a week I receive calls from
16 my congresswoman, Haley Stevens, who just so happens served as
17 chief of staff of the Obama administration's Auto Industry
18 Emergency Rescue Team, inviting me to attend a constituent
19 outreach meeting. These are robo calls. I have never had the
20 honor of meeting my congresswoman, speaking with her nor have I
21 ever contributed to her or any other political candidates
22 because I am Hatch'ed and I want to keep this wonderful
23 position. Thank you.

24 Okay. Then let us proceed with FCA's motion to
25 dismiss the complaint.

ARGUMENT BY MR. HOLLEY

1 If you mention a name of a case or an individual's
2 name that has not been mentioned so far, please spell it to
3 help Mrs. Lizza, the court reporter, who has the toughest job.
4 You must speak slowly and clearly. And having looked at both
5 of your backgrounds, all three of you, I know that you are
6 accomplished litigators in court and that you respect court
7 reporters and the Court.

8 So please proceed on behalf of FCA.

9 MR. HOLLEY: Good morning, Your Honor. Again, Steven
10 Holley from Sullivan & Cromwell in New York for the defendants,
11 Fiat Chrysler Automobiles N.V. and FCA US LLC, both of which
12 have filed motions to dismiss GM's complaint. Consistent with
13 the Court's scheduling order, I'm going to first address the
14 motion to dismiss filed by FCA US LLC, and for the sake of
15 simplicity, I will refer today to FCA US LLC as FCA and to Fiat
16 Chrysler Automobiles N.V. as FCA N.V.

17 I know the Court is familiar from the criminal cases
18 over which the Court has presided with the general
19 circumstances giving rise to this case. Certain former
20 employees of FCA who are named as individual defendants in this
21 case facilitated payments to certain former employees of the
22 United Auto Workers from funds belonging to the FCA-UAW
23 National Training Center. GM alleges that these payments were
24 orchestrated by FCA itself, an allegation that FCA vigorously
25 denies. However, for purposes of this motion to dismiss only,

ARGUMENT BY MR. HOLLEY

8

1 FCA accepted the allegations as true in arguing that GM has
2 nonetheless failed to state a valid RICO claim.

3 Parroting paragraph 11 of the Alphons Iacobelli plea
4 agreement, and that's A-L-P-H-O-N-S --

5 THE COURT: We have that. He's a party to the case,
6 so in terms of those names, Mr. Holley, we have them, yeah.
7 But I appreciate. That's better than forgetting. Okay. Go
8 ahead.

9 MR. HOLLEY: Thank you, Your Honor.

10 Parroting paragraph 11 of the Iacobelli plea
11 agreement, GM claims that FCA made alleged prohibited payments
12 to the UAW in order to obtain, quote, benefits, concessions and
13 advantages for FCA in the negotiation, implementation and
14 administration of the collective bargaining agreements between
15 FCA and the UAW, closed quote.

16 GM alleges that it did not receive similar benefits,
17 concessions and advantages from the UAW with the consequence
18 that FCA's labor costs were substantially lower than GM's which
19 supposedly enabled FCA to compete more effectively against GM.
20 So collective bargaining agreements between FCA and the UAW lie
21 at the very core of GM's case.

22 In assessing the validity of GM's claims, there are
23 three points that I ask the Court to bear in mind at the outset
24 with regard to RICO. First, in enacting RICO, Congress was
25 targeting the patterns of racketeering activity. It was not

ARGUMENT BY MR. HOLLEY

9

1 purporting to federalize state tort law so that every person
2 who claimed to have suffered some injury at the hands of
3 someone else suddenly had a claim for treble damages under
4 federal law.

5 Secondly, courts subject RICO claims to substantial
6 scrutiny at the motion to dismiss stage, and that is true both
7 because of the potential reputational harm suffered by
8 defendants who are unfairly accused of engaging in racketeering
9 activity and also because RICO cases are typically big cases
10 like antitrust cases that involve massive amounts of discovery
11 and courts do not want to put defendants to the burden and
12 expense of defending against such a large case unless the
13 claims are well founded.

14 And third, Your Honor, courts are particularly
15 skeptical of RICO claims brought by economic competitors like
16 GM's claims in this case because such claims threaten to
17 measure the line between RICO claims and antitrust claims under
18 the Sherman Act and the Clayton Act.

19 Against that background, Your Honor, the biggest flaw
20 in GM's claims in this case is a lack of causation. GM has not
21 plausibly alleged that with what it refers to as one and a half
22 million dollars of alleged prohibited payments are the but-for
23 cause as well as the proximate cause of what GM contends are
24 billions of dollars in damages in the form of increased labor
25 costs.

ARGUMENT BY MR. HOLLEY

10

1 GM has two inconsistent theories about how it was
2 supposedly injured by its alleged prohibited payments, so it is
3 necessary to consider each of those theories separately with
4 regard to the issue of causation.

5 The first theory is that from the emergence of GM and
6 FCA's predecessor, which was called Chrysler Group LLC, from
7 bankruptcy in 2009 through mid-2015, FCA made prohibited
8 payments to the UAW that caused the UAW to confer various
9 benefits on FCA such as the ability to have more tier two
10 workers who are lower paid than GM had. According to GM, this
11 resulted in GM having average hourly labor costs that were \$8
12 higher than FCA's, \$47 an hour in the case of FCA versus \$55 an
13 hour in the case of GM. So that's this theory number one.

14 Theory number two is that the alleged prohibited
15 payments are what caused the UAW to pick FCA as the lead among
16 The Big Three Detroit automakers in negotiating the 2015
17 collective bargaining agreement and that that put FCA in a
18 position to agree to what GM calls the most union-friendly
19 contract in history. And according to GM, FCA knew that this
20 very rich contract it agreed to with the UAW would be pressed
21 on GM as a result of pattern bargaining thereby increasing GM's
22 labor costs. And GM contends that FCA's goal in raising GM's
23 labor cost was to make GM more amenable to a merger with FCA
24 which is a proposal that GM's board of directors had already
25 rejected once in April of 2015.

ARGUMENT BY MR. HOLLEY

11

1 So, first, Your Honor, I want to talk about but-for
2 causation as applied to these two theories. Neither of them
3 passes muster under *Ashcroft, A-S-H-C-R-O-F-T, versus Iqbal,*
4 *I-Q-B-A-L*, in which the Supreme Court said that a claim has to
5 be plausible on its face and not be based on mere labels or
6 naked assertions.

7 Other than conclusory allegations, GM has no basis for
8 asserting that it was the alleged prohibited payments that had
9 caused FCA's labor cost to be lower than GM's in the period
10 from 2009 to 2015. And the implausibility of that assertion is
11 underscored by the fact that it was GM not FCA that was the
12 lead in negotiating the 2011 collective bargaining agreement so
13 GM bears primary responsibility for the impact of that contract
14 and GM's labor costs.

15 And common sense dictates that a wide range of factors
16 like the relative seniority of the GM and FCA workforces or the
17 amount of overtime worked by employees at the two companies had
18 a substantial bearing on the relative hourly labor costs of GM
19 and FCA in the period from 2009 through 2015.

20 With regard to the second theory about the 2015
21 collective bargaining agreement, GM's allegations as to but-for
22 causation are even less plausible. First, GM has not explained
23 why it would have been necessary for FCA to make the alleged
24 prohibited payments in order to persuade the UAW to make FCA
25 the lead in negotiating the 2015 collective bargaining

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12

1 agreement if the FCA knew that FCA -- if the UAW knew, excuse
2 me, Your Honor, that FCA was prepared to enter into a very
3 union-friendly contract. In fact, the UAW likely had a duty to
4 its members to make that choice.

5 Second, GM itself alleges, and this is in paragraph
6 134 of the complaint, Your Honor, that by 2015 both FCA and the
7 UAW knew that the federal government was investigating the
8 alleged prohibited payments. And by the time FCA was selected
9 by the UAW as the lead in September, 2015, the supposed
10 ringleaders were already gone. General Holiefield of the UAW
11 died of pancreatic cancer in February of 2015 and Alphons
12 Iacobelli left FCA in May of 2015.

13 Third, the notion that the 2015 collective bargaining
14 agreement between FCA and the UAW was structured to increase
15 GM's labor cost through pattern bargaining makes no sense on
16 its face when the news articles GM references in its complaint
17 point out that a major feature of that contract was to increase
18 the wages of tier two workers, a change that had the greatest
19 adverse impact on FCA because, as GM points out, FCA had a much
20 larger proportion of tier two workers than GM.

21 Your Honor, even if GM could persuade the Court that
22 alleged prohibited payments were the but-for cause of its
23 alleged injury, GM cannot escape the indirectness of that
24 alleged injury which fails RICO's strict proximate cause test.
25 Starting again with the period from 2009 to 2015 in which GM

ARGUMENT BY MR. HOLLEY

13

1 claims that the UAW made various concessions to FCA and, quote,
2 without regard to the interest of UAW members, those are GM's
3 words not mine, Your Honor, from paragraph 71 of the complaint,
4 the complaint itself makes clear that the most direct victims
5 of this conduct, if it occurred, were rank and file members of
6 the UAW. If the UAW agreed to let FCA pay its workers less
7 money and pay less attention to worker grievances and health
8 and safety issues, then it was plainly the UAW membership that
9 would be most directly affected.

10 GM then goes on to allege that the individual
11 defendants failed to report the alleged improper payments to
12 the Internal Revenue Service making the federal government the
13 next most directly affected party, and that puts GM at best in
14 third place. But the Supreme Court has made clear in cases
15 like *Hemi*, H-E-M-I, and *Anza*, A-N-Z-A, that only the most
16 directly injured party can sue under RICO and efforts to go
17 beyond the first step in the chain of causation are not
18 permitted.

19 GM fares no better under its second theory with regard
20 to proximate cause. There are many steps in the chain of
21 causation between FCA being selected as the lead in negotiating
22 the 2015 collective bargaining agreement and the purported
23 injury to GM in the form of increased labor costs.

24 As one example, Your Honor, the original contract
25 agreed by FCA and the UAW was rejected by UAW members and had

ARGUMENT BY MR. HOLLEY

14

1 to be sweetened before they would agree to it. And obviously
2 that rejection had nothing to do with the alleged prohibited
3 payments.

4 Furthermore, the entire notion that FCA sought to
5 increase GM's labor costs in order to somehow soften GM up for
6 a merger defies economic logic. GM has not explained why
7 having higher labor costs would make GM any more willing to
8 merge with FCA or why FCA would ever want its prospective
9 merger partner to be saddled with unfavorable collective
10 bargaining agreements for the next four years.

11 Now, GM has various arguments about why this causation
12 requirement doesn't apply, but none of them is available, Your
13 Honor. First, foreseeability is not the test for proximate
14 cause under RICO. GM asked the Court to embrace the notion
15 that the Sixth Circuit's decision in *Wallace*, W-A-L-L-A-C-E,
16 versus *Midwest Financial* directly contradicts controlling
17 Supreme Court precedent by holding that foreseeability is all
18 you need to establish proximate cause under RICO but that can
19 not be right, Your Honor.

20 Another court in this district has already rejected
21 the same attempt by a RICO plaintiff to use *Wallace* in an
22 effort to circumvent the Supreme Court's decisions in *Anza* and
23 *Hemi*. That case, Your Honor, is *Kerrigan*, K-E-R-R-I-G-A-N,
24 versus *Visalus*, V-I-S-A-L-U-S, 112 F. Supp. 3d 580, Eastern
25 District of Michigan, 2015.

ARGUMENT BY MR. HOLLEY

15

1 And even on its own terms --

2 THE COURT: That's a district court case, correct?

3 MR. HOLLEY: Yes, Your Honor. My point was that
4 another district court had already rejected the notion that the
5 Sixth Circuit was overruling the Supreme Court.

6 But even on its own terms, *Wallace* does not help GM
7 because unlike in *Wallace* it is not possible to, in the words
8 of the court, trace a straight line, end quote, between the
9 alleged prohibited payments and GM's alleged injury. The line
10 GM is asking this court to draw is anything but straight.

11 Second, it does not matter that GM says it was the
12 intended target of an alleged scheme involving FCA and the UAW.
13 As the Sixth Circuit said in *Perry*, P-E-R-R-Y, against American
14 Tobacco, quote, specific intent to harm does not magically
15 create standing or cause injuries to be direct, unquote.

16 Third, the fact that GM claims it can identify an
17 injury that is distinct from injuries suffered by more directly
18 affected parties is irrelevant. Even if GM could establish
19 that its injury is unique, it still has to show that that
20 injury was directly caused by prohibited payments and that is
21 something that GM has not and cannot do.

22 I'm not going to spend a lot of time with them, Your
23 Honor, but the Supreme Court identified three factors in
24 *Holmes*, H-O-L-M-E-S, against Securities Investor Protection
25 Corporation that underscore why GM is not a proper RICO

ARGUMENT BY MR. HOLLEY

16

1 [discernible].

2 First, others [discernible] of the alleged
3 prohibited --

4 THE COURT: You're breaking up a little. Can you
5 start that sentence again, please? "Other," go ahead. Sorry,
6 sir.

7 MR. HOLLEY: Yes, Your Honor. Other more direct
8 victims of the alleged prohibited payments can sue and have
9 already done so. Several rank and file members of the UAW
10 brought actions challenging the alleged prohibited payments
11 long before GM brought this case.

12 Second, the notion that GM's labor costs were
13 increased as a direct result of the alleged prohibited payments
14 is inherently speculative and attempting to trace what GM's
15 labor costs would have been in the absence of the alleged
16 prohibited payments would be the opposite of straightforward
17 which is what it's supposed to be.

18 Again [discernible] does not [indiscernible] does not
19 deny that causes other than the bribery scheme, these are GM's
20 words, may have contributed to [indiscernible].

21 (The court reporter requests clarification.)

22 MR. HOLLEY: So what I was saying is that this
23 speculative chain of causation is especially true because GM at
24 page 15 of its opposition does not deny that, quote, causes
25 other than the bribery scheme may have contributed to GM's

ARGUMENT BY MR. HOLLEY

17

1 higher costs, closed quote. And third, GM alleges in
2 paragraph 12 of the complaint that, quote, all stakeholders in
3 the U.S. auto industry, closed quote, were affected by the
4 prohibited payments.

5 So concern about multiple recoveries is very real.
6 The sheer number of potential plaintiffs in GM's contemplation
7 would make an allocation of damages in this case incredibly
8 complicated. So because GM has not plausibly alleged either
9 but-for causation or proximate cause, all of its RICO claims
10 should be dismissed, Your Honor.

11 The next problem GM faces is that it has not
12 adequately alleged the requisite pattern of racketeering
13 activity. The alleged prohibited payments, if they occurred,
14 were an unfair labor practice under Section 302 of the National
15 Labor Relations Act. Such a claim is subject to exclusive
16 jurisdiction of the National Labor Relations Board which has a
17 proceeding pending against FCA and the UAW relating to these
18 very same alleged prohibited payments. It is true that
19 improper payments to union officials under the Taft-Hartley Act
20 are listed as a potential predicate act in the RICO statute,
21 but that does not mean that a private RICO plaintiff like GM
22 can assert such a claim.

23 In *Trollinger, T-R-O-L-L-I-N-G-E-R, v. Tyson,*
24 *Foods*, the Sixth Circuit held that a federal court
25 can adjudicate a civil claim based on conduct prohibited by

ARGUMENT BY MR. HOLLEY

18

1 federal labor laws only if, quote, the labor questions in the
2 case amount to no more than collateral issues, closed quote.

3 Here, of course, Your Honor, the labor questions are
4 absolutely central making this a labor case masquerading as a
5 RICO case. And that's confirmed by the fact that last year the
6 Sixth Circuit in a case called *DeShelter*, D-E capital
7 S-H-E-L-T-E-R, v. FCA US dismissed claims based on these same
8 alleged prohibited payments because they were, quote, unfair
9 labor practice claims over which the NLRB has exclusive
10 jurisdiction, closed quote.

11 Without the alleged prohibited payments as predicate
12 acts, GM's RICO claims against FCA cannot survive.

13 The next problem, Your Honor, is that under 1962(b),
14 Section 1962(b) of the RICO statute, GM has not plausibly
15 alleged that FCA acquired an interest in or obtained control
16 over the United Auto Workers. Now, saying that FCA used the
17 alleged prohibited payments to gain a degree of influence over
18 certain decisions made by the UAW is not enough. GM had to
19 allege that FCA gained power over the day-to-day operations of
20 the union akin to what a majority shareholder would have over a
21 corporation. It has to be a proprietary interest not merely
22 influence. GM has not made such an allegation, Your Honor.

23 The added problem is that GM was supposed to allege an
24 injury by virtue of FCA's purported acquisition of control over
25 the UAW, that is, quote, separate and apart from the injuries

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19

1 suffered as a result of the predicate acts of racketeering
2 activity, closed quote. That is the Sixth Circuit case called
3 Aces, A-C-E-S, High Coal Sales Inc. against Community Bank and
4 Trust from last year. But GM did not even attempt to allege a
5 distinct acquisition of control injury different from its
6 alleged predicate acts.

7 Finally, Your Honor, moving to the statute of
8 limitations, all of GM's claims premised on conduct that
9 occurred prior to November 20, 2015, four years before GM
10 brought this case, are barred by RICO's four-year statute of
11 limitation. GM wants to avoid that result by arguing that the
12 statute of limitations did not begin to run until GM discovered
13 what it calls the bribery scheme involving FCA and the UAW.
14 But as the Supreme Court made clear in a case called *Rotella*,
15 R-O-T-E-L-L-A, versus *Wood*, it is the discovery of the alleged
16 injury not discovery of the other elements of a RICO claim that
17 starts the clock running. And GM knew that its hourly labor
18 costs were substantially higher than FCA's long before
19 November 20, 2015, based on publicly available information.
20 Yet [discernible] --

21 THE COURT: Start that again, please. I had to move a
22 page. Sorry.

23 MR. HOLLEY: No problem, Your Honor.

24 THE COURT: I will issue a warning when I have to move
25 a page or get a court decision to quote, so I apologize to

ARGUMENT BY MR. HOLLEY

1 Mrs. Lizza and I'll do a -- I'll say "stop" and we'll go from
2 there. So please repeat that. Thank you.

3 MR. HOLLEY: Yes, Your Honor. So the point I was
4 making is that GM knew that its hourly labor costs were
5 substantially higher than FCA's long before November 20, 2015,
6 based on publically available information. Yet GM sat on its
7 hands for more than two years after the first indictment was
8 unsealed in the criminal cases involving the alleged prohibited
9 payments deciding to bring this case only after FCA announced
10 its intention to merge with Groupe PSA in France, the maker of
11 Peugot and Citroen cars. Your Honor, such a lack of diligence
12 and strategic behavior should not be rewarded.

13 THE COURT: So you're saying forget about the
14 four-year statute of limitations because actions took place
15 that created a situation where they would know that they had
16 been harmed and those actions bolster your argument with regard
17 to the statute of limitations? Is that what you're saying?

18 MR. HOLLEY: Not exactly, Your Honor. What we're
19 saying is that we accept the proposition that the 2015
20 collective bargaining agreement which was ratified literally,
21 you know, four years to the day before we brought their lawsuit
22 is within the statute of limitations. We think that claim
23 should be dismissed for multiple other reasons. But conduct
24 that occurred before, you know, November 20 of 2015 is not a
25 valid basis for a RICO claim because it's barred by the

ARGUMENT BY MR. HOLLEY

21

1 four-year statute of limitations.

2 THE COURT: Thank you.

3 MR. HOLLEY: So, Your Honor, I would now propose to
4 move to FCA N.V.'s motion to dismiss, if that's all right with
5 the Court.

6 THE COURT: Why don't we stop on this right now and
7 then I've allotted a separate time for the N.V. So we're going
8 to do the -- well, you know what? Let's go ahead with N.V.
9 because that's just another ten minutes on top of that. So it
10 will assist the Court. Go ahead.

11 MR. HOLLEY: Yes, Your Honor. So with regard to FCA
12 N.V.'s motion to dismiss, GM improperly seeks to shift the
13 burden to FCA N.V. but it was GM's burden to make a *prima facie*
14 showing that the Court can exercise personal jurisdiction over
15 FCA N.V. consistent with the dictates of the due process
16 clause. That's not what GM did.

17 Just for starters, GM does not contend that FCA is
18 subject to a general jurisdiction nor could GM make that
19 contention because FCA N.V. is not at home in Michigan which is
20 what GM would be required to show under the Supreme Court's
21 decision in *Daimler*, D-A-I-M-L-E-R, versus *Bauman*, B-A-U-M-A-N.
22 GM does not deny that FCA N.V. is a Dutch corporation with its
23 principal executive offices in London. Instead, GM asserts
24 that FCA N.V. is subject to specific jurisdiction. But in its
25 95-page complaint FCA fails to plead any facts demonstrating

ARGUMENT BY MR. HOLLEY

1 that FCA N.V. had purposeful contacts with the State of
2 Michigan or the United States, for that matter, and that GM's
3 claims in this case arose from those contacts. Nothing in the
4 indictments, the plea agreement or the sentencing memoranda on
5 which GM places such great reliance in its complaint even
6 suggests that FCA N.V. had anything to do with the alleged
7 prohibited payments much less that the parent company in the
8 Netherlands orchestrated those payments as part of a scheme to
9 harm GM.

10 THE COURT: Was Mr. Marchionne -- was Mr. Marchionne
11 the head of FCA N.V. and FCA when he passed?

12 MR. HOLLEY: Yes, Your Honor, he was the CEO of both
13 corporations.

14 THE COURT: Thank you.

15 MR. HOLLEY: GM tries to hide the absence of facts of
16 FCA N.V. by engaging in group pleading referring to something
17 called FCA Group throughout the complaint which GM defines to
18 include both FCA US and FCA N.V. but there is no corporate
19 entity called FCA Group. There's FCA N.V., the parent company
20 which is a holding company, and its wholly-owned operating
21 subsidiary in the United States which is FCA US LLC.

22 Comparing the allegations in the complaint to the
23 documents that GM relies on as support for those allegations
24 makes clear that the actions attributed to FCA Group do not
25 implicate FCA N.V. at all. For example, Your Honor, in

ARGUMENT BY MR. HOLLEY

1 paragraph 70 of the complaint GM alleges that, quote, FCA Group
2 funds, closed quote, were used for lavish dinners and golf
3 outings for UAW officials. As support for that allegation, GM
4 relies on the plea agreement of Norwood Jewell. I think he's
5 probably someone you're familiar with.

6 THE COURT: Quite.

7 MR. HOLLEY: N-O-R-W-O-O-D. But that document says
8 nothing about FCA N.V. At pages 9 and 10 it states that the
9 funds at issue were FCA funds, and FCA in the plea agreement is
10 defined as FCA US not FCA N.V.

11 GM's allegations that the prohibited payments were
12 made, quote, with the knowledge and the approval of FCA N.V. is
13 similarly unavailing. That allegation concerns a purely
14 passive act even if it occurred not the sort of intentional act
15 directed at the forum state which is what you need to support
16 specific jurisdiction. And GM's conclusory allegations that
17 FCA N.V. acted through Mr. Marchionne who, as the Court pointed
18 out, was the CEO of both FCA N.V. and FCA US at the relevant
19 time is not a basis for asserting specific jurisdiction.

20 GM alleges no facts to overcome the well established
21 presumption which comes from the Supreme Court's decision in
22 *U.S. v. Bestfoods*, B-E-S-T-F-O-O-D-S, one word, that an officer
23 holding positions with both a parent company and its subsidiary
24 is acting on behalf of the subsidiary. And that presumption
25 makes particular sense here because GM alleges that

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24

1 Mr. Marchionne took actions in Michigan to influence the
2 negotiation of collective bargaining agreements between FCA US
3 and the United Auto Workers, contracts to which FCA N.V. was
4 not a party and which related solely to U.S. workers in U.S.
5 factories. Those contracts had nothing to do with the
6 Netherlands, Your Honor.

7 In sum, GM has not plausibly alleged that FCA N.V.
8 engaged in activities in Michigan that gave rise to GM's
9 claims. Having failed to make a *prima facie* showing of
10 specific jurisdiction as to FCA N.V., it was not necessary for
11 FCA N.V. to introduce evidence on this motion confirming that
12 it was not subject to specific jurisdiction in the United
13 States.

14 And very briefly, Your Honor, even if the Court were
15 to conclude that it could exercise personal jurisdiction over
16 FCA N.V. and was not persuaded to dismiss the entire complaint
17 based on the deficiencies I noted earlier today with regard to
18 FCA US's motion to dismiss, the Court should nonetheless
19 dismiss the claims against FCA N.V. under Rule 12(b)(6).

20 GM was required to plausibly allege that each
21 defendant, not in a group but each defendant, was involved in
22 the performance of the requisite predicate acts of racketeering
23 activity. But if you look at the complaint, the only
24 references to FCA N.V. are a description of FCA N.V. in
25 paragraph 17 of the complaint, a purported statement of the

ARGUMENT BY MR. NEDELMAN

25

1 basis of personal jurisdiction over FCA N.V. in paragraph 42 of
2 the complaint and a conclusory allegation in paragraph 64 of
3 the complaint that FCA N.V. had, quote, knowledge and approval,
4 closed quote, of the alleged prohibited payments. Such thread
5 bare allegations are not sufficient, Your Honor, to state a
6 RICO claim against FCA N.V.

7 Thank you, Your Honor. That's all I have on those two
8 motions to dismiss. I would be happy to answer any questions
9 the Court may have.

10 THE COURT: Not right now. I may have when you
11 return.

12 Okay. Now we're up to Mr. Nedelman.

13 MR. NEDELMAN: Thank you, Your Honor. Again, Michael
14 Nedelman appearing on behalf of Alphons Iacobelli.

15 I believe that Mr. Holley very capably discussed the
16 case law regarding the requirement for but-for causation, but I
17 think it's important to even take a step back. Despite 95
18 pages by General Motors in its complaint trying to weave a
19 compelling story, General Motors never actually alleges in the
20 complaint that but for the alleged predicate acts General
21 Motors would not have suffered damages.

22 In the absence of that very simple statement, it's
23 fatal to the maintenance of General Motor's claims. It could
24 have done it had it wanted to fulfill its pleading
25 requirements, but I think there's a -- an understandable reason

ARGUMENT BY MR. NEDELMAN

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1 why it didn't. And the reason that it didn't is because there
2 is no way for General Motors in good faith to plead that but
3 for the alleged predicate acts GM wouldn't have suffered the
4 damages that it claims to have suffered.

5 Without abject speculation, there is no way that
6 General Motors could have alleged the terms and conditions that
7 it alleges it would have reached in the UAW different than the
8 terms and conditions it ultimately reached. What General
9 Motors is actually asking this Court to do, Your Honor, is to
10 award -- well, first, allow GM to pursue a claim and then award
11 damages based upon the speculative outcome of a hypothetical
12 set of labor negotiations that would have the Court reenact the
13 2015 labor negotiations, assume that but for the predicate acts
14 GM would have been identified as the initial target then
15 speculate further on what the ultimate terms and conditions of
16 that labor negotiation would have been, further assume that the
17 UAW would have recommended those terms and conditions to its
18 membership and then further assume that the membership would
19 have agreed to those terms and conditions.

20 That speculation, that very type of analysis is
21 speculation in the extreme and the type of speculation found
22 infirm in *Empire Merchants, E-M-P-I-R-E, Merchants, LLC versus*
23 *Reliable Churchill LLP*, is the type of speculation that this
24 court could never and should not engage in.

25 So even though -- even if GM had alleged but-for

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1 causation which it didn't, which is fatal to its claim, the
2 nature of the speculative inquiry that this Court would have to
3 entertain bars the maintenance of this claim.

4 I agree with Mr. Holley on behalf of FCA that under
5 controlling case law the complaint fails to adequately plead
6 proximate cause and that that alone is sufficient to compel
7 dismissal of this case. The statute of limitations argument, I
8 differ with Mr. Holley in only the following regard. While I
9 agree that everything well prior to November 20 of 2015 is
10 barred, I think the Court's inquiry has to go a little farther
11 than that. The Supreme Court in *Rotella* has said, well, look,
12 if there are storm warnings, if you should have been aware, if
13 you should have been on inquiry, if you had notice, the clock
14 starts running. Well, General Motors in its complaint and, in
15 particular, if I pick the latest dates, at complaint
16 paragraph 132, General Motors itself alleges that in October of
17 2015 it conducted its own analysis of the UAW contract and
18 concluded that it would be damaged in its view by the
19 application of the pattern bargaining system as the next in
20 line to negotiate with the UAW. And that should have been
21 sufficient to trigger at the absolute latest the running of
22 this four-year statute of limitations, and the filing of a
23 complaint on November 20 of 2019 was simply too late.

24 I would also note a significant difference between the
25 positioning of FCA and that of Mr. Iacobelli because

ARGUMENT BY MR. NEDELMAN

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1 Mr. Iacobelli, as Mr. Holley noted, departed from FCA and the
2 National Training Center on June 9th of 2015. The four-year
3 statute of limitation could not have extended to November 20 of
4 2019 which GM attempts to do.

5 And for that reason and for the reasons set forth in
6 our moving papers, we request the complaint be dismissed.

7 Thank you, Your Honor.

8 THE COURT: Okay. Thank you, Mr. Nedelman.

9 Before we take a break and then, Mr. Willian, as you
10 argue, we're going to take a break, but I may say "stop." It
11 is not intended to be rude. It is only intended to let me --
12 to grab a paper or a case and to then follow your continuing
13 argument. So just be aware of that because Mrs. Lizza has the
14 toughest job and I did not realize that when I usually grab
15 papers that it does interfere with the argument.

16 So we'll see everybody in ten minutes. Thank you.

17 MR. NEDELMAN: Thank you, Your Honor.

18 (Court in recess, 10:47 a.m. to 10:54 a.m.)

19 THE LAW CLERK: Court is back in session.

20 MR. WILLIAN: Hello, Judge. I could not hear you
21 there for a moment.

22 THE COURT: Can you hear me now?

23 MR. WILLIAN: I can, yes, sir.

24 THE COURT: Why does it show a lock, Jason, on my
25 screen, on the right?

ARGUMENT BY MR. WILLIAN

29

1 Maura, do you know why?

2 MR. OWENS: It has to do with the configuration of the
3 unit itself. It's something you can ignore.

4 THE COURT: Okay. Okay. These days it's hard to
5 ignore technological innovations.

6 Okay. Mr. Willian, please.

7 MR. WILLIAN: Yes. May it please the Court, my name
8 is Jeff Willian. I represent the plaintiffs General Motors LLC
9 and General Motors Company.

10 With great specificity based significantly on
11 defendants' own criminal admission, GM has alleged a
12 long-running racketeering scheme designed to directly harm GM
13 and provide FCA and FCA N.V. with a competitive advantage.
14 This was a pay-to-harm scheme implemented by defendants
15 literally within weeks of entering the U.S. marketplace in
16 2009. Year after year FCA bribed UAW leaders to provide FCA
17 with certain structural labor advantages that were expressly
18 denied to GM and then eventually --

19 THE COURT: Are you saying that when it came out of
20 bankruptcy, wasn't there a calculus that Chrysler was saved
21 because they had to merge with someone or -- and the President
22 even said you have to merge with we'll call it FCA or you're
23 going to go under. And so wasn't that part of the calculus in
24 creating the benefit for FCA, and GM at the same time received
25 the President's attention to the extent that there's no way

ARGUMENT BY MR. WILLIAN

30

1 that he was going to let it go under. So weren't those
2 benefits part of the TARP rescue program that FCA should get to
3 stay alive because of the cost structure at that time and
4 didn't those continue on?

5 MR. WILLIAN: No. No, sir. So the structural
6 elements that we're talking about are labor components that had
7 nothing to do with that. Those are advantages that were
8 purchased through a bribery scheme. And so -- and we detail
9 those with great detail. They relate to World Class
10 Manufacturing, tier two and tier one. They relate to temps.
11 Those aren't derived specifically from any regulation or TARP.
12 Those were the specific subject of bribery. Those advantages
13 were purchased through bribery and logically they could not be
14 given to GM, the same advantages.

15 And that's precisely what we allege, that this was a
16 pay-to-harm scheme. And the key here, Your Honor, the key here
17 is the industry itself. The industry here --

18 THE COURT: When you say pay to harm, you're talking
19 about pay to harm GM not pay to harm UAW workers.

20 MR. WILLIAN: That's precisely correct, Your Honor.

21 THE COURT: Okay. Now, you had Global Manufacturing,
22 but that was your program that was comparable to FCA's World
23 Class Manufacturing, but you're saying it wasn't comparable
24 because of your claim about pay to play.

25 MR. WILLIAN: That's correct, Your Honor. So with

ARGUMENT BY MR. WILLIAN

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1 respect to manufacturing operations, pay to play involved FCA
2 paying to get labor flexibility for their World Class
3 Manufacturing which is a program that was expressly denied to
4 GM. GM asked for this advantage and it was denied, and it was
5 denied because of the bribes.

6 THE COURT: It was denied because of the bribes or it
7 was denied because of the way they rolled out of bankruptcy
8 where the government had said FCA is a mess or Chrysler is a
9 mess, the last chance is for FCA to take over Chrysler and
10 we're going to give them some degree of assistance to try and
11 let them recover and keep those jobs in the Chrysler/FCA area
12 to allow the company to survive and progress.

13 MR. WILLIAN: So we understand that Chrysler --
14 everyone wanted Chrysler to survive, but once they rolled out
15 of bankruptcy, after they rolled out of bankruptcy the question
16 is how would they operate --

17 THE COURT: You're saying everyone wanted Chrysler to
18 survive. Did GM want Chrysler to survive or did they want to
19 pick off -- if it went under, did they want to pick off Jeep
20 and Ram and maybe mini vans too?

21 MR. WILLIAN: Well, certainly the government wanted
22 Chrysler to survive, but my point is, Your Honor, after
23 Chrysler rolled out of bankruptcy and starting in May of 2009,
24 it -- to make sure that it didn't crash, Mr. Marchionne and
25 Mr. Iacobelli implemented a bribery scheme. It's well

ARGUMENT BY MR. WILLIAN

1 documented, and the very fundamental purpose of that scheme, as
2 Mr. Iacobelli admits, was to purchase advantages that were to
3 be denied to GM. That was -- GM was the intended target of the
4 scheme because Chrysler wanted or FCA wanted to outcompete GM.

5 THE COURT: Didn't Mr. Iacobelli, when he left FCA,
6 get hired by GM?

7 MR. WILLIAN: He did, Your Honor. At that time, of
8 course, GM had no indication whatsoever there was any sort of
9 scheme that was going on nor was that ever disclosed to GM at
10 the time by Mr. Iacobelli.

11 THE COURT: And GM, I presume, vetted him and knew he
12 was driving a 300 and something thousand dollar car and doing
13 all these various financial issues on his behalf personally
14 and...

15 MR. WILLIAN: Yeah. I understand the question, but GM
16 did vet him and had absolutely no knowledge whatsoever nor is
17 it in the complaint that Mr. Iacobelli had engaged in this
18 bribery scheme since 2009 nor could it. Mr. Iacobelli took
19 many, many steps to hide that scheme.

20 THE COURT: Okay.

21 MR. WILLIAN: So if I could go to but-for cause, Your
22 Honor. But-for cause in a nutshell is --

23 THE COURT: Let's also use the term "proximate cause"
24 because that's pretty heavy in the Supreme Court decisions with
25 regard to the issue that we're facing.

ARGUMENT BY MR. WILLIAN

1 MR. WILLIAN: I -- that's fine, Your Honor. I first
2 will address but-for cause and then I'll go to proximate cause.

3 THE COURT: Okay. Thank you.

4 MR. WILLIAN: They are separate.

5 So in a nutshell there should be no question that GM
6 has alleged but-for cause here. It's alleged that FCA's
7 fraudulent scheme made perfect economic sense if one is willing
8 to commit fraud, bribe union leaders who control the labor
9 markets to harm a competitor by using their bargaining power to
10 impose higher costs on a competitor. That is the definition of
11 but-for cause. The bribes cause GM economic harm.

12 If you want to go to 2015, we can go to 2015. FCA
13 makes the argument that that scheme as alleged made no economic
14 sense, that Mr. Marchionne would craft such an outsized CBA
15 with asymmetrical costs to harm GM to force a merger, but, Your
16 Honor, you need go no further than look at the words of
17 Mr. Marchionne that are alleged in the complaint at paragraph
18 116. Mr. Marchionne states openly in June of 2015 that it
19 would be unconscionable not to force a merger. That was his
20 goal --

21 THE COURT: He definitely from day one I think, even
22 before he took over, had the idea of creating a merger between
23 those two entities. The question is whether that intent to try
24 and create a merger is in play here to the extent that
25 everything that occurred was done to try and create a merger

ARGUMENT BY MR. WILLIAN

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1 and it was done illegally. But there's no question that he did
2 seek a merger, then they had Operation Cylinder and he tried to
3 proceed with those matters. But that doesn't mean that there
4 was a proximate cause situation here with regard to the CBA in
5 2015 which you have said benefited Chrysler workers
6 significantly. So the fact that Chrysler was a target or I'll
7 call it FCA, does that mean that, therefore, GM was a victim?

8 MR. WILLIAN: Well, the target was GM. GM was the
9 victim of this scheme and, again, we can go to Mr. Marchionne's
10 own words which we point out in our response and have never
11 been addressed by FCA, and that's at paragraph 129 of the
12 complaint where Mr. Marchionne, after the 2015 CBA had been
13 negotiated and before it was going to be pressured on GM
14 through the power of pattern bargaining, stated the economics
15 of the deal are almost irrelevant because the costs pale in
16 comparison to the magnitude of the potential synergies and
17 benefits of, as we allege, forcing a merger with GM. He all
18 but admitted the scheme other than the bribes. And the only
19 way he was able to accomplish that CBA which included
20 asymmetrical costs to harm GM was to secure the lead through
21 bribes and then he crafted it to harm GM and he admitted that
22 here openly. It was a bribe-fueled negotiation with the UAW.

23 THE COURT: When you say he admitted bribing people to
24 get a deal or you're saying that the facts played out, showed a
25 bribe?

ARGUMENT BY MR. WILLIAN

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1 MR. WILLIAN: So obviously he didn't admit. I said he
2 admitted to the scheme all but the bribes, I thought, and
3 obviously eventually we learned that his dealings with the UAW
4 in connection with the 2015 CBA was fueled by bribery.

5 The but-for cause, Your Honor, has easily been met,
6 and I'll turn to proximate cause unless you have further
7 questions on but-for cause.

8 THE COURT: Please proceed.

9 MR. WILLIAN: So with respect to proximate cause, an
10 important procedural point for the Court is this argument only
11 goes to the 1962(c) claim. It does not go to the 1962(b)
12 claim. I think the Court is well aware of that, but I just
13 wanted to make sure that was clear on the record.

14 So --

15 THE COURT: The proximate cause does not go to all the
16 RICO claims? You're saying that there's a gap in the law?

17 MR. WILLIAN: No, I'm not, Your Honor. So when you
18 look at all the authorities that are cited having *Anza*, *Holmes*,
19 *et cetera*, they are -- those cases are addressing a 1962(c)
20 proximate cause claim. 1962(b), the proximate cause is quite
21 different. There the harm has to come from the control itself.
22 So here we've alleged that the UAW, their decision making for
23 the CBAs were controlled and that is easily met. So here with
24 respect to the 1962(c) claim, the harm has to come from the
25 racketeering activity, the bribes themselves. So it is a

ARGUMENT BY MR. WILLIAN

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1 different analysis and the arguments of defendants only on
2 proximate cause, if you go back in the briefs, you'll see
3 that's confirmed, only go to 1962(c).

4 THE COURT: Well, I think they cite the Supreme Court
5 decisions to say proximate cause within the RICO claim means
6 proximate cause, period.

7 MR. WILLIAN: Understood. The authority that we're
8 speaking about and the arguments that are being made go to
9 1962(c). But regardless, the first critical point I want to
10 make to this court is that it is the nature of this industry
11 that allowed FCA to inflict racketeering harm on GM. The UAW
12 controls the labor markets for both FCA and GM. It exclusively
13 represents both GM and FCA workforce. It's with this market
14 power with its principle function of negotiating a CBA and
15 administering the CBA that the scheme was able to be pulled
16 off. So once the UAW became willing to accept bribes to impose
17 higher costs on our competitor, and did so as alleged here, the
18 direct harm is claimed. The UAW had the power to directly harm
19 GM. It had that position and it did accept those bribes and,
20 as alleged, it directly harmed GM.

21 Nobody else, Your Honor, nobody else suffered these
22 higher labor costs. Nobody else has a claim for these higher
23 labor costs. There's no issue of allocation. There's no issue
24 of double recovery. Only GM has suffered this harm.

25 I would ask the Court to look closely, as it will, I'm

ARGUMENT BY MR. WILLIAN

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1 sure, to the *Bridge* case and the Seventh Circuit's *Empress*
2 *Casino* case. In both those cases, it was the nature of the
3 industry that allowed direct harm from one competitor to
4 another. In *Bridge* it was that unique closed auction system
5 where one competitor was able to rig the auction and caused
6 direct harm on another competitor. In the *Empress Casino* it
7 was a competitor's bribe to a governor who like the UAW had the
8 power to take action, there sign a harmful piece of legislation
9 into law and directly harm a competitor.

10 So the point is this industry is like those
11 industries. There's the opportunity for the direct harm
12 because the UAW sits in the middle of GM. It sits in the
13 middle of FCA and controls their labor markets. The line --

14 THE COURT: Didn't the UAW workers vote down a
15 contract so -- you're saying the UAW, if the workers vote down
16 a contract, they're acting independently? Doesn't GM have the
17 ability to say no, we're not going to follow -- in other words,
18 going into bankruptcies, you're saying there was a pattern, all
19 the labor experts say there was pattern bargaining, and even
20 though when they came out there were differences between the
21 pay structures of the companies that they came out of the
22 bankruptcy situations that the government was well aware of in
23 terms of the TARP program and was going to try and was
24 recommending continuing for a while, and you're saying the
25 awhile meant stop at a certain point and then you're saying

ARGUMENT BY MR. WILLIAN

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1 everything had to be specifically pattern bargaining even
2 though GM on its own could resist a pattern, could call a
3 strike and proceed that way.

4 MR. WILLIAN: So we have detailed allegations on
5 pattern bargaining. It is a effective tool. It has market
6 power because it is backed up in 2015 by the threat of strike
7 as GM recently experienced. So you can say that GM could just
8 say no, but it can't. It's foreseeable, it's a natural that
9 when a specific labor term is trying to be pushed onto GM that
10 the power of the UAW and the power of pattern bargaining would
11 allow that to happen. That's what pattern bargaining is; it's
12 an effective tool.

13 THE COURT: Was pattern bargaining something that had
14 the same control after the bankruptcies and going forward?
15 Yes, they did talk about pattern bargaining and, yes, the UAW
16 did pick FCA but does that mean that automatically GM suffers
17 because they pick FCA, they get a rich contract. You're saying
18 the fact that the FCA bargaining created a rich contract for
19 their employees hurt GM because GM also would have to follow
20 and provide a rich contract for their employees?

21 MR. WILLIAN: So I'm saying two things, Your Honor.
22 First, as of 2015, which is what your question goes to, the CBA
23 was agreed to and then GM had to follow pattern. UAW used
24 their bargaining power, their power of strike to naturally push
25 that contract onto GM. Yet the consequences of GM not agreeing

ARGUMENT BY MR. WILLIAN

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1 to pattern is a very costly strike. That is proximate cause,
2 Your Honor, because it's foreseeable and it's natural that the
3 power of pattern bargaining could be used to force that on GM.
4 That's 2015 and pre-2015 is different.

5 So pre-2015 the pattern of power bargaining does not
6 come into play like it does in 2015, because in 2011 there was
7 no right to strike by the UAW and so pre-2015 these were
8 specific structural programs that would have saved GM money
9 that it asked for and the UAW denied because it was being
10 bribed. FCA instructed it was not to give those programs to GM
11 and GM was denied those savings programs incurring higher
12 costs. That is the definition of direct harm, Your Honor.

13 THE COURT: You're saying that FCA not just got a
14 benefit but also said don't give these to GM or was the UAW
15 saying the whole structure going forward was different between
16 these companies and the fact that FCA got certain concessions
17 meant that if GM then was following, that they were a potted
18 plant, that they had to, to use Brendan Sullivan's words from
19 back many years ago, that they didn't -- they were
20 straightjacketed by this program and could not be an
21 independent thinker or an independent player within the
22 automotive industry?

23 MR. WILLIAN: So it's obviously not what we're
24 alleging, Your Honor. The point is the UAW has market power.
25 The UAW can say no and there's nothing GM can do about it.

ARGUMENT BY MR. WILLIAN

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1 It's a controlled labor force. Think of it as monopoly power.
2 So when GM asked for the same labor advantage that FCA got and
3 it's denied, it has reasons to believe that perhaps the UAW is
4 acting in good faith, but we now know that it was part of a
5 bribery scheme.

6 And as to proximate cause, Your Honor, it's a very
7 straightforward analysis. Bribes from FCA went to UAW who had
8 the power to harm GM by denying them those same structural
9 labor programs, and they did it. That is classic --

10 THE COURT: You're saying the UAW did it but the UAW
11 is not a defendant in this case and they seem to be the one
12 that everything is aimed at, their conduct. And yet they're
13 not a defendant in this case, correct?

14 MR. WILLIAN: They are not a defendant in this case,
15 that's correct, Your Honor. But as alleged, they are a
16 co-conspirator, and we've alleged that at great length
17 obviously, and here we're alleging that the UAW was used as a
18 tool essentially, they had bargaining power, they were bribes
19 and they were used as a tool to directly harm GM. They had the
20 power to do so and they did.

21 THE COURT: Thank you.

22 MR. WILLIAN: Staying with proximate cause for one
23 minute, Your Honor.

24 THE COURT: Please.

25 MR. WILLIAN: Yes. We would ask the Court to closely

ARGUMENT BY MR. WILLIAN

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1 follow Wallace. Wallace has many helpful factors in it, but --

2 THE COURT: Okay. Let me just help Mrs. Lizza,

3 *Wallace v. Midwest Financial*, 714 F.3d 414, Sixth Circuit,

4 2013.

5 Let me just read a couple quotes from *Wallace* where it
6 begins and then you can go with regard to where it continues.

7 And if my paper reading impacts Mrs. Lizza, let me know and
8 we'll get it straight.

9 So in *Wallace*, the Supreme -- the Sixth Circuit says
10 "The Supreme Court has held in no uncertain terms that under
11 each provision a plaintiff must show that the predicate acts
12 not only were a but-for cause of injury but were the proximate
13 cause as well, citing *Holmes versus SIPC*," which we talked
14 about before.

15 Proceeding further, the Sixth Circuit says "In *Holmes*,
16 the Supreme Court explained that this language requires
17 plaintiffs to plead and prove proximate causation."

18 Thereafter in the opinion, the Sixth Circuit discusses
19 Court of Appeals decisions *Perry versus American Tobacco* and
20 also see *Hemi Group* which talks about the requirement about
21 proximate cause.

22 The Sixth Circuit then goes over and talks about
23 foreseeability and then says that "while proximate cause is
24 flexible," and it then cites *Bridge*, but it doesn't cite *Hemi*
25 *Group* for that and *Hemi Group* came after *Bridge* in 2010.

ARGUMENT BY MR. WILLIAN

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1 Bridge was in 2008.

2 The Sixth Circuit then says, "However, the Supreme
3 Court recently held," again, citing *Bridge* but not *Hemi* which
4 was more recent than *Bridge*, "that proximate cause can be a
5 little -- not axially proximate cause," and then it cites
6 Justice Thomas's dissenting and concurring opinion in *Anza*
7 which is, again, a dissenting and concurring opinion.

8 So I have a question about -- and then the impact of
9 *Wallace* as whether it really undermines Supreme Court
10 precedent, changes it or fails to recognize what the court held
11 in both *Anza* and in *Hemi* group when it says the -- because --
12 in *Hemi Group* which is 130 Supreme Court 983, "We explained,"
13 talking about prior decisions, "proximate cause is required
14 and, as we reiterated at *Holmes*, the general tendency of the
15 law in regard to damages is not to go beyond the first step."
16 And then the Supreme Court said that in this situation that
17 "our precedent", this is in *Hemi Group* again, at page 12, "Our
18 precedent made clear that in the RICO context the focus is on
19 the directness of the relationship between the conduct and the
20 harm. *Anza* and *Holmes* never even mention the concept of
21 foreseeability."

22 Okay. Go ahead. I'll hear your argument on *Wallace*
23 and the other cases, but I thought it important to, as I read
24 these, to at least quote the Supreme Court precedent and the
25 point within *Wallace* where it repeats the Supreme Court

ARGUMENT BY MR. WILLIAN

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1 precedent but yet goes into a further discussion of a concept
2 that I think the Supreme Court has not in any way accepted.

3 MR. WILLIAN: So the point I would make is importantly
4 to the Court's observations. GM's claims do not depend on
5 foreseeability. GM's claims are direct. Just like in *Hemi*,
6 there is one step to causation. You have a bribe from FCA to
7 the UAW who has the power to harm GM and it does so by denying
8 it specific labor advantages. Or in the case of the 2015 CBA,
9 pressuring GM through the power of pattern bargaining to accept
10 the CBA that it did that cost GM an extra billion dollars above
11 what the UAW initially negotiated with it.

12 These are --

13 THE COURT: So both of those help the workers, they
14 get better deals under the CBAs, but you're saying that's
15 corrupt.

16 MR. WILLIAN: So we have to break down the pre-2015
17 and the 2015, Your Honor.

18 THE COURT: Okay.

19 MR. WILLIAN: So with respect to the 2015 CBA, yeah,
20 incidentally that probably helped the FCA workers or the UAW
21 workers but it --

22 THE COURT: And the GM workers.

23 MR. WILLIAN: And the GM workers. But it was corrupt
24 because FCA was able to obtain the lead through bribes and
25 then, as we allege, they crafted a CBA to asymmetrically harm

ARGUMENT BY MR. WILLIAN

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1 GM because it had a higher number of tier one workers, itself a
2 product of the prior bribery scheme. Yes, that is direct harm.

3 But let's go back to the pre-2015 allegations, Your
4 Honor. There the line is straight and direct. The bribes went
5 from FCA to the UAW. The UAW had the power to harm GM and they
6 denied those advantages to GM. And the point I wanted to make
7 out of *Wallace* which I think the Court will agree has not been
8 in any way contradicted by *Hemi*, is the Court found in *Wallace*
9 it highly relevant that the proximate cause analysis that
10 *Wallace* was the targeted victim, highly relevant. And as the
11 Court stated, once we accept *Wallace*'s status as the intended
12 target, the link between the scheme and the injury is plain to
13 see. That is the same here, Your Honor. GM has alleged that
14 it was the targeted victim. Mr. Marchionne's own words make
15 that clear. And, therefore, the line, the proximate cause, is
16 plain to see.

17 THE COURT: When you say his own words, specify,
18 please.

19 MR. WILLIAN: Yeah. They're the same words that I
20 specified before, Your Honor, that Mr. Marchionne said it would
21 be unconscionable not to force a merger with GM and then --

22 THE COURT: He did that goal from day one when he took
23 over -- when the government said take it over and save us, and
24 I know your complaint mention -- that, you know, they paid not
25 \$1 for it, but at the same time he said I have FCA, wouldn't it

ARGUMENT BY MR. WILLIAN

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1 be great if we could merge with GM to save everybody a lot of
2 money, to help workers to get better pay and to help the auto
3 industry in the United States.

4 MR. WILLIAN: Yes. And that could be a completely
5 legal goal. The only problem is, Your Honor, that he tried to
6 accomplish that goal through bribery. That's alleged in detail
7 first to obtain a competitive advantage against GM by making
8 sure that GM had higher labor costs. He did that through
9 bribes, then trying to force the merger in 2015.

10 So he's admitted the outline of the scheme, if you
11 will. And we only learned about the bribery part of it much
12 later, after January of 2018.

13 THE COURT: Thank you.

14 MR. WILLIAN: So concluding on proximate cause, Your
15 Honor, the line from the bribe to the UAW to GM is straight and
16 simple, and the ultimate point is only GM has these -- this
17 claim for damages, nobody else does. There's no issue of
18 apportionment; there's no issue of proximate cause. I'm sorry,
19 there's no issue of speculative damages. And that's why this
20 case is different than *Holmes* and *Hemi* and *Anza* --

21 THE COURT: Well, you say there's no speculative
22 damages. In terms of damages, was Ford damaged?

23 MR. WILLIAN: They may very well have been damaged,
24 Your Honor. We don't know the answer to that. We don't know
25 their labor structure. But it doesn't -- it's not relevant --

ARGUMENT BY MR. WILLIAN

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1 THE COURT: But with regard to the damages issue,
2 you're saying that we're going to -- if the Court finds that
3 you are the victim proximately, that damages then are
4 calculated based on hourly workers, based on plant locations,
5 based upon tier workers during particular times, based on the
6 various. Each category goes into that. How speculative or how
7 deep diving will we be going to try and assess damages in this
8 case and how many months and months of experts and testimony
9 and calculations will there be to try and see what -- if there
10 are damages, what the damages were, when they occurred or are
11 you saying, Judge, that's not for you to think about now, but
12 at the same time there are cases which say, look, that's why we
13 have proximate cause, so you don't have to try and go after and
14 decide about damages but here, will it be close to mega
15 litigation on damages that will be down the road if the Court
16 finds for GM?

17 MR. WILLIAN: So unlike the damages asserted in all
18 the cases, the proximate cause cases cited by the defendants,
19 we're not seeking lost sales or market share. We're not
20 seeking those type of speculative damages. We are seeking
21 damages for GM's increased labor cost because of these bribes.
22 That is a cost accounting issue, Your Honor. That's exactly
23 what these companies do all the time. They track their labor
24 costs. So we don't think the damages here are terribly
25 complex. So, for example, if you take the formulary, GM asked

ARGUMENT BY MR. WILLIAN

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1 for this formulary, it was denied. It's easy to calculate how
2 much that would have saved GM every year. So the damages here
3 aren't terribly complex, and they don't speak to indirectness,
4 Your Honor, at all.

5 We would refer the Court to the remand of the *Bridge*
6 case. I'm going to give the Court a case cite. It's *BCS*
7 *Services Inc. v. Heartwood*, 637 F.3d 750, Seventh Circuit,
8 2011. That's the remand of the *Bridge* case, Your Honor. And
9 in that case it turned out damages were complex once the
10 factual record was developed. And the district court there
11 said damages are complex, therefore, no proximate cause. And
12 the Seventh Circuit reversed and said that's not the proper
13 analysis.

14 THE COURT: Oh, I'm not saying that because damages
15 are complex there's no proximate cause. I'm just talking about
16 a down-the-road situation in this case. And in terms of --
17 well, go ahead, sir. I'm sorry.

18 MR. WILLIAN: Well, and that's fine. I would just ask
19 the Court to look at that with respect to the differences
20 between fact of damage and complexity in calculating damages.

21 And then to just finish off that answer, with respect
22 to the 2015 CBA, the damages are straightforward. We know what
23 the UAW had initially agreed to with GM as far as the cost of
24 the 2015 CBA and we know what eventually was forced on us
25 through the power of pattern bargaining as a result of the

ARGUMENT BY MR. WILLIAN

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1 bribe-fueled negotiations. And that's approximately a billion
2 dollars, Your Honor, and that's easily calculable.

3 THE COURT: And that was forced upon you, and you had
4 no ability to decide whether to accept or take a strike with
5 regard to that, correct?

6 MR. WILLIAN: So the answer is, Your Honor, with
7 respect to power of pattern bargaining, which is alleged in
8 detail in the complaint, GM had very little choice. It could
9 take a strike, I suppose, but the point is that would be
10 extremely costly. And so the point is that the UAW has market
11 power, the power to carry out the wishes of FCA and force this
12 contract on us to try to force the merger and that's --

13 THE COURT: Thank you.

14 MR. WILLIAN: That is alleged in the complaint, and
15 obviously this is a 12(b)(6) motion and all those allegations
16 should be accepted as true.

17 I will -- I'm over my time, Your Honor, so it's --

18 THE COURT: That's okay. If you want to deal with FCA
19 N.V., I'm not going to stop.

20 MR. WILLIAN: Okay. I believed the other issues are
21 well briefed. Would you like to hear any comments on the
22 preemption argument, Your Honor?

23 THE COURT: This is your argument, and I'm not going
24 to stop you. If you want to proceed shortly with regard to
25 that, because I had a lot of questions here, the extent that

ARGUMENT BY MR. WILLIAN

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1 your opposing counsel I didn't have questions, so I'm giving
2 you the opportunity in fairness.

3 MR. WILLIAN: So just briefly on the preemption
4 argument, Your Honor, that argument is contradicted by the
5 plain language of the RICO statute and the precedent of every
6 court that has ever considered the issue. Obviously, Congress
7 included Section 186 violations in the RICO statute because
8 they intended those to be included as predicate acts in the
9 RICO claim. There's no carve-out from that whatsoever. The
10 legislature has spoken. That's why every court who has
11 considered the issue of preemption when there's a 186 RICO
12 claim has said -- has denied preemption.

13 The only case that FCA cites in support, this is the
14 *Trollinger* case. The *Trollinger* case did not consider the
15 issue of 186 being in a RICO statute though it is off point.
16 So we would ask the Court to follow the precedent of the courts
17 who have actually considered the issue and *Trollinger* did not.

18 On the issue of control, briefly, we believe we've
19 clearly met the standard of pleading control here. I heard
20 counsel argue today. I thought they had recognized they had
21 made an error in stating the standard in the brief that
22 proprietary control is needed. That is not the case, Your
23 Honor. Proprietary control does not need to be alleged. Here
24 we've cited the cases that indicate control must be read
25 broadly, and importantly we cited the cases that indicate that

ARGUMENT BY MR. WILLIAN

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1 where a plaintiff alleges that causing an entity to enter into
2 transactions that it would not otherwise have entered
3 constitutes sufficient control. We've alleged that in detail
4 in the complaint that the control caused the UAW to enter into
5 transactions they would not otherwise do. I'll let the
6 complaint speak for itself on that because that's extremely
7 detailed.

8 Finally on the statute of limitations, Your Honor, FCA
9 has misapplied the standard that should govern here, as this
10 Court has recognized the standard is one of discovering --
11 learning about the possibility of fraud. GM did not learn
12 about the possibility of fraud until Mr. Iacobelli's plea
13 agreement in January of 2018. Before that GM had no knowledge
14 about the possibility of fraud --

15 THE COURT: You're saying that there was lightning and
16 thunder but no rain, that they don't have a duty to act at that
17 time and so they had to wait for the rain or the monsoon to
18 occur?

19 MR. WILLIAN: No, I'm not, Your Honor. I'm not saying
20 there was any lightning or any thunder. To the contrary, as
21 you recognized in the *State Farm* case, we have the right to
22 rely on the good faith presumption that the FCA and the UAW are
23 operating at arm's length, and there's nothing in the record
24 whatsoever to indicate that there were any storm warnings, to
25 use your storm analogy. Put simply, there was no possibility

ARGUMENT BY MR. WILLIAN

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1 of fraud indicated by any of the evidence.

2 THE COURT: Even though you say the whole tradition of
3 auto bargaining forever is pattern bargaining and while this
4 was something that was contrary to the entire tradition of
5 pattern bargaining to pick the lesser pocket rather than the
6 deepest pocket and, therefore, there wasn't a storm warning
7 when that occurred?

8 MR. WILLIAN: There was a surprise for sure, Your
9 Honor, but it's not a storm warning indicating fraud or
10 systematic bribery of this nature. No, sir.

11 THE COURT: Okay. Thank you.

12 MR. WILLIAN: So that's -- concludes my argument with
13 respect to FC US LLC's -- FCA US LLC's motions to dismiss. We
14 would ask the Court to deny that motion for the reasons stated.

15 THE COURT: Okay. Do you want to speak with regard to
16 FCA N.V.? Or is your -- or is that argument subsumed already?

17 MR. WILLIAN: No, it has not been subsumed, Your
18 Honor. That argument pertains to the jurisdiction of FCA N.V.

19 THE COURT: Yep.

20 MR. WILLIAN: And I can be brief here.

21 THE COURT: I think so. I think so.

22 MR. WILLIAN: Okay. I'll be very brief, Your Honor.

23 THE COURT: Thank you. You don't have to be very
24 brief, but, you know, I think it doesn't play out into a long
25 discussion, sir.

ARGUMENT BY MR. WILLIAN

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1 MR. WILLIAN: Yes. So FCA N.V. brought this motion on
2 the assumption that we had only alleged or the claim that GM
3 had only alleged that FCA N.V. had the knowledge and approval
4 of the alleged -- or the bribery payments, and on that basis
5 they made their motion, Your Honor. But we plainly have
6 alleged active involvement in the bribery scheme by FCA N.V.
7 That's detailed obviously in our briefing, so I won't go
8 through it all in detail. But we allege very specifically that
9 Mr. Marchionne acted as FCA N.V. CEO and that he instructed
10 Mr. Iacobelli to engage in this bribery scheme. That scheme
11 took place for six years. So FCA N.V. was actively directing
12 this bribery scheme for those years.

13 We allege that Mr. Marchionne contacted GM directly to
14 try to force this merging and implementing Operation Cylinder.
15 We allege that GM turned down this proposal and then
16 Mr. Marchionne, on behalf of FCA N.V., engaged in the scheme
17 that he did with respect to the 2015 CBA.

18 So GM has alleged very specific acts by FCA N.V. It's
19 not group pleading. Where we can identify the specific acts by
20 FCA N.V. we did and those are active acts not passive acts,
21 ones involving instruction and making payments, sending letters
22 and the like. So we believe this Court clearly has
23 jurisdiction over FCA N.V. as alleged in the complaint.
24 Notably, this is a relatively low burden since it's being
25 submitted to the Court on the papers.

ARGUMENT BY MR. WILLIAN

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1 THE COURT: Let me ask you a question. In *Anza*,
2 A-N-Z-A, Supreme Court said the element of proximate causation
3 recognized in *Holmes* is meant to prevent these types of
4 intricate uncertain inquiries from overrunning RICO litigation.
5 It has particular resonance when applied to claims brought by
6 economic competitors which left unchecked could blur the line
7 between RICO and the antitrust laws.

8 You're seeking treble damages, huge amounts of money,
9 to -- would this be to gravely injure or destroy a competitor,
10 one of the three U.S. automakers with tens of thousands -- more
11 than tens of thousands of workers? And is this more
12 appropriately not a RICO matter with treble damages but really
13 an antitrust claim if it applies? And I'm not even going there
14 because that's a whole nother thing. But isn't this what we're
15 looking at here where there's three companies, domestic, and
16 you're seeking treble damages, huge amounts of money that would
17 severely impact FCA in their ability to continue automobile
18 production?

19 MR. WILLIAN: So, first, if I could just address,
20 *Anza*, it does not apply to this case, Your Honor. *Anza* is not
21 a precedent that has application here because that is an
22 indirect harm case --

23 THE COURT: I know. I'm just talking about the
24 concept of a nuclear situation with regard to the impact going
25 forward.

ARGUMENT BY MR. WILLIAN

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1 MR. WILLIAN: I can't predict the impacts, Your Honor.
2 All I can say is this was a bribery scheme that lasted for
3 years, and the whole point of the bribery scheme was to target
4 GM and impose higher costs on it. I'm not sure exactly what
5 all those costs are. They are significant. It's a significant
6 case. The intent is not to destroy FCA or whatever you're
7 suggesting. The intent is for GM to get compensated for the
8 direct harm that it incurred from this bribery scheme.

9 THE COURT: Understand. Okay. Thank you,
10 Mr. Willian.

11 MR. WILLIAN: Thank you.

12 THE COURT: Okay. At this point then we're going
13 to -- did you want to respond to Mr. Iacobelli's counsel,
14 Mr. Willian?

15 MR. WILLIAN: Yes, I can briefly respond to
16 Mr. Iacobelli's counsel. His arguments did largely mirror FCA
17 counsel. I will say that Mr. Iacobelli, with respect to the
18 statute of limitations, makes the novel argument that's not
19 supported by law. That's the statute should have begin to run
20 pre-November of 2017 based on the circumstances of the
21 negotiation of the 2015 CBA. There's no law that supports
22 that. Clearly, the clock does not run until there's injury.
23 The potential of future injury does not run the clock and we
24 cite the *Rite Aid Corp. v. AB -- American Express Travel* case,
25 708 F. Supp. 2d 257 on that.

FURTHER ARGUMENT BY MR. HOLLEY

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1 THE COURT: That's a district court case where, sir?

2 MR. WILLIAN: That's in the Eastern District of New
3 York, 2010.

4 THE COURT: Thank you.

5 MR. WILLIAN: And, therefore, that argument does not
6 hold. And with respect to his remaining statute of limitations
7 argument, it is the same as FCA's and I've already addressed
8 that. I think that was the only unique argument I heard from
9 Mr. Nedelman that bears responding to you at this point, Your
10 Honor.

11 THE COURT: Okay. We'll take a 15-minute break rather
12 than a ten-minute break.

13 Mrs. Lizza, do you need more than 15 minutes?

14 THE REPORTER: No, 15 should be fine, Judge.

15 THE COURT: Okay. Then we will return in 15 minutes
16 for the replies and they can be longer than 15 minutes and they
17 probably will be. Thank you.

18 MR. HOLLEY: Thank you, Your Honor.

19 (Court in recess, 11:45 a.m. to 12:00 p.m.)

20 THE LAW CLERK: Court is back in session.

21 THE COURT: Then please proceed on behalf of FCA.

22 MR. HOLLEY: Yes, Your Honor.

23 THE COURT: And I'm not going to hold it to 15 because
24 I think, again, we've raised issues and there are certainly a
25 lot of complicated issues and so, you know, we're not going to

FURTHER ARGUMENT BY MR. HOLLEY

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1 just stop at 15 and close the --

2 MR. HOLLEY: Okay.

3 THE COURT: -- hearing. Thank you.

4 MR. HOLLEY: I appreciate that, Your Honor. I'm going
5 to try to be brief nonetheless.

6 In terms of but-for causation, Mr. Willian said that
7 the defendants have made criminal admissions. I just want to
8 make it very clear that neither the FCA US LLC nor FCA N.V.
9 have made any criminal admissions. Neither corporation has
10 admitted to doing anything wrong in connection with the alleged
11 prohibited payments.

12 And Mr. Willian said I think at least three times that
13 the whole point of the alleged bribery scheme was to harm
14 General Motors by imposing higher labor costs on it. But I
15 think we need to do a reality check with regard to that
16 assertion because GM's entire case is predicated on
17 indictments, plea agreements and sentencing memoranda in cases
18 with which the Court is familiar and there is no mention of
19 General Motors in any of those documents. So how plausible can
20 it be that GM was the target of this behavior when nobody is
21 talking about General Motors?

22 If you look at what the Justice Department says -- and
23 I'm not agreeing with this, I'm just saying what they say --
24 they say that the point of these alleged prohibited payments
25 was to create labor peace and to grease the skids in

FURTHER ARGUMENT BY MR. HOLLEY

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1 negotiations between the UAW and the FCA. If that's right,
2 and, again, I don't agree with it, that has nothing to do with
3 General Motors. That has to do with the UAW and FCA. And if
4 GM is a proper RICO plaintiff in this case, then so is Ford and
5 so is every other automaker in North America that has unionized
6 workers. And the reason why is because the flip side of giving
7 a sweetheart deal to FCA is that you don't give that deal to
8 everybody else.

9 So if FCA corruptly got lower labor costs, that didn't
10 just hurt General Motors; it hurt Ford, it hurt everyone. So
11 you can't have it that only GM is affected by this. And it's
12 pure semantics to say, oh, this didn't -- you know, this really
13 wasn't something that benefited FCA workers or hurt the FCA
14 workers. It was all directed at General Motors.

15 THE COURT: Well, if I may respond, might they say,
16 yeah, others could bring cases but let's focus on our case,
17 we're dealing with specifically GM?

18 MR. HOLLEY: Yes, Your Honor. But that just goes to
19 show that under *Holmes* they are not a proper plaintiff because
20 there are other more directly harmed people who have already
21 brought suit, namely, the rank and file members of the United
22 Auto Workers. The NLRB has brought suit on behalf of -- you
23 know, enforcing the federal labor laws. And in order to try to
24 allocate damages if GM is one of, I don't know, you know, tens
25 of potential plaintiffs is precisely the sort of thing that the

FURTHER ARGUMENT BY MR. HOLLEY

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1 Supreme Court in *Holmes* said is the rationale for saying only
2 the most directly injured party may sue and that you're not
3 supposed to go beyond the first step in the chain of causation.

4 So I think when Mr. Willian -- I was a little
5 surprised, but when he said in response to your question that
6 Ford might have a claim, that seems to me to prove our point
7 which is that, you know, under GM's view of the world, half of
8 Detroit, frankly, Chattanooga, Tennessee and other places all
9 have claims based on these alleged prohibited payments.

10 Mr. Willian spent a lot of time talking about Mr. Marchionne's
11 comments.

12 I encourage the Court to actually look at the video
13 that is linked at paragraph 64 of the complaint on page 59. I
14 actually think this link is broken, but I don't think
15 Mr. Willian would mind if I sent the Court a link that works.
16 But what Mr. Marchionne is talking about is two things. First,
17 he says that the 2015 collective bargaining agreement, by
18 reducing the disparity between tier one and tier two workers,
19 has solved an issue of making it more appealing for young
20 people to come into the auto industry, solving the labor
21 problem. And then he says that he's going to turn his
22 attention to the capital problem which is, as Your Honor
23 pointed out, has been a focus or was a focus of his for years
24 and years because he believed that there were too many car
25 companies with too many different models that were enormously

FURTHER ARGUMENT BY MR. HOLLEY

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1 expensive. And there's a whole slide presentation on the
2 internet called Confessions of a Capital Junkie from April of
3 2015 where he sets out his views.

4 The notion that that statement is an admission of a
5 scheme designed to hurt General Motors I do not understand. I
6 mean it's a country mile from that. He's talking about the
7 capital structure of the auto industry.

8 It's also wrong to say that the *Bridge* case and the
9 *Empress Casino* case helped General Motors on the issue of
10 proximate cause. Those are both quite unique cases based on
11 their facts and they have no application here. In *Bridge*,
12 there were these auctions for tax liens and there was so much
13 demand for the tax liens that they were assigned on a
14 rotational basis. And the defendant jimmied with that
15 rotational system and unfairly got more of the tax liens than
16 it should have gotten. And the only party injured was the
17 competing bidder who unfairly was cheated out of liens they
18 should have gotten. The county that was selling the tax liens
19 got the same amount of money because, you know, it was just --
20 they didn't care who bought them, they just got the money. So
21 there the disappointed bidder is the only injured party, the
22 most directly injured party, and it makes sense to say that
23 they have standing under RICO.

24 And in *Empress Casino*, the governor of Illinois was
25 bribed to create a system where the five casino owners in the

FURTHER ARGUMENT BY MR. HOLLEY

1 state had to pay a percentage of their profits into a fund for
2 the benefit of the horse racing industry. The people who were
3 injured were easy to identify; it was the five casino owners
4 who had to pay money into this corruptly created fund.

5 This is very, very different, and I have to disagree
6 with Mr. Willian. Trying to trace the alleged injury here
7 either before 2015 or after 2015 is not an accounting exercise.
8 You have to go -- as Mr. Nedelman pointed out, you have to go
9 through a game theory exercise to figure out what would the
10 collective bargaining agreements between the UAW and FCA and
11 the UAW and GM have looked like in the but-for world and then
12 tried to figure out what portion of the differential in that
13 hypothetical construct was attributable somehow to the alleged
14 prohibited payments. That is a very, very complex exercise,
15 Your Honor, exactly the sort of thing that the Supreme Court in
16 *Holmes* was saying is a reason for this direct injury
17 requirement.

18 And Mr. Willian said several times, and I just want --
19 I think the Court picked up on this, but he said that what FCA
20 did was to try to gain a competitive advantage vis-a-vis
21 General Motors. That really kind of points up the fact that
22 this is precisely the sort of case by an economic competitor
23 that the Supreme Court said courts should be cautious of
24 because they bore the distinction between RICO claims and
25 antitrust claims. If GM thinks that they have some sort of

FURTHER ARGUMENT BY MR. HOLLEY

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1 unfair competition claim against FCA that is actionable under
2 the Sherman Act, that's the case they should have brought not
3 this case.

4 So, Your Honor, turning to the FCA N.V. motion to
5 dismiss very briefly, Your Honor. Mr. Willian said that there
6 are specific allegations in the complaint about conduct that
7 was actively engaged in by FCA N.V. With respect, Your Honor,
8 I don't believe that's accurate. I read the three paragraphs
9 where FCA N.V. is mentioned and they don't say they did
10 anything [indiscernible]. So that means that GM is relying on
11 the behavior engaged in by Mr. Marchionne who was, as we know,
12 the CEO of both FCA N.V. and FCA US. But Mr. Willian didn't
13 mention and there's no answer to our point that the Supreme
14 Court's decision in the *Bestfoods* case says quite clearly that
15 the presumption is in these circumstances that Mr. Marchionne
16 was acting wearing his FCA US hat. If he was talking to
17 Mr. Iacobelli who worked for FCA US, he was talking to him in
18 his capacity as the CEO of the U.S. operating subsidiary not in
19 his capacity as the CEO of a holding company in the
20 Netherlands.

21 So, Your Honor, those were the points I wanted to
22 make. Obviously if Your Honor has questions, I would be happy
23 to answer them.

24 THE COURT: No. Thank you.

25 Okay. Mr. Nedelman.

FURTHER ARGUMENT BY MR. NEDELMAN

1 MR. NEDELMAN: Thank you. Thank you, Your Honor.

2 I will also try and keep my comments reasonably brief
3 because we have set forth our positions I think fairly
4 comprehensively in our papers.

5 It appears though what GM is really upset about is
6 that they're upset with the implementation of the UAW of a
7 contractual relationship or two, 2011 to the 2015, that General
8 Motors entered into voluntarily, and their remedy under those
9 circumstances, if there was any impropriety in the course of
10 negotiations or the implementation of the contract, was to
11 seek -- to file an unfair labor practice charge before the
12 NLRB. GM hasn't done that. GM has gone out of its way to, in
13 its papers, to not focus on the UAW when, in fact, it's the
14 UAW's conduct that General Motors complains about.

15 General Motors also in its papers and in Mr. Willian's
16 statements to the Court tries to blur -- actually Mr. Iacobelli
17 has admitted seeking advantages for the benefit of FCA.
18 There's no question about that. General Motors has attempted
19 throughout its complaint and its argument this morning to add
20 to Mr. Iacobelli's admissions, which addition doesn't exist,
21 that it was to harm General Motors. And as Mr. Holley
22 indicated, there is nothing in the record that points to any
23 conduct intended to harm General Motors as opposed to conduct
24 that has admittedly been undertaken to benefit FCA.

25 There is -- when I look at General Motor's complaint,

FURTHER ARGUMENT BY MR. NEDELMAN

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1 particularly paragraphs 125 to 135, those are the storm
2 warnings. General Motors describes the very conduct that
3 should have under existing case law alerted it and, in
4 particular, the allegations at complaint paragraph 132. When
5 the Court looks at paragraph 132, I trust the Court will see
6 that General Motors conducted its own analysis, concluded it
7 was going to be harmed, concluded it suffered injury and it
8 draws its -- General Motors' reliance on the pattern bargaining
9 concepts into clear focus. GM --

10 THE COURT: In what year are you directing us to in
11 terms of GM's situation right then?

12 MR. NEDELMAN: Well, certainly the 2015 contract
13 because in paragraph 132 of the complaint General Motors
14 acknowledges that it conducted its own analysis of the FCA-UAW
15 contract and concluded that it was forecast to cost GM more
16 than double what it anticipated.

17 That analysis, that understanding dovetails into the
18 crux of General Motors' complaint which is it claims to be
19 bound by the construct of the pattern bargaining, and yet it
20 doesn't want to be bound by its own knowledge of the
21 consequence of the very thing it relies on. And I don't think
22 General Motors can have it both ways. If it was the
23 beneficiary of those negotiations, if it was expecting to
24 follow them, if it understood the effect. I mean if all of
25 what General Motors alleges is true and excepting for these

FURTHER ARGUMENT BY MR. NEDELMAN

1 purposes that it was bound to the pattern bargaining, then it
2 also knew when FCA entered into the 2015 contract in October of
3 2015 --

4 THE COURT: Which is more than four years before the
5 complaint, that's what you're getting at.

6 MR. NEDELMAN: Correct. And it knew it had suffered
7 injury and the statute of limitations had expired by the time
8 it filed suit in November of 2019. I can also take issue with
9 General Motor's assertion that the damage calculation is
10 somehow simple. As I indicated earlier, the machinations that
11 the Court would have to go through to hypothetically engage in
12 labor negotiations and then determine what that outcome would
13 have been, determined what the membership would have agreed to,
14 it's impossible, truly impossible to measure whatever General
15 Motors believes its damages were because there is no baseline
16 against which to measure them. Certainly can't be measured
17 against GM's expectations. And so there is no measurement by
18 which this Court could engage in as the trier of fact and, as a
19 consequence, the damages are purely speculative.

20 With that, Your Honor, if you have any questions, I'm
21 happy to answer them.

22 THE COURT: No, I don't. But right now I'm going to
23 issue an order with regard to this case that will be entered
24 after I read it.

25 "I'm taking this case under advisement and,

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1 if necessary, of course, I will be prepared
2 to rule.

3 But because today, like every day now, is
4 not an ordinary day, I'm entering this
5 order.

6 The world has changed dramatically since
7 this case was filed on November 20th, 2019.

8 This city, this state and this country need
9 healing.

10 The COVID-19 pandemic and its impact on the
11 health of this country requires our
12 attention here and now.

13 Just as important is our response to the
14 tragic death of George Floyd that has
15 brought to the forefront the long-standing
16 issues of racial discrimination and social
17 justice that require our attention and
18 solution here and now.

19 If this case goes forward, there will be
20 years of contentious litigation, motion
21 hearings, multiple-day depositions of large
22 numbers of key executives and former
23 executives at GM and FCA, as well as UAW
24 officials and other defendants and many
25 third parties and a plethora of RICO, labor

ORDER OF THE COURT

1 law and damages experts.

2 These legalities will not only divert and
3 consume the attention of key GM and FCA
4 executives from their day jobs, issues of
5 vehicle production, sales, worker safety,
6 rollouts, supplier issues, et cetera, but
7 also prevent them from fully providing their
8 vision in leadership on this country's most
9 pressing social justice and health issues."

10 And I mean directly not through committees
11 that they may set up.

12 "In 2008, and going forward, the federal
13 government focused on rescuing GM and
14 Chrysler by providing billions of dollars in
15 aid. That saved GM and Chrysler, now FCA,
16 and tens and tens of thousands of UAW auto
17 workers' jobs. Today our country needs and
18 deserves that these now-healthy great
19 companies pay us back by also focusing on
20 rescuing this country and its citizens from
21 the plagues of COVID-19, racism and
22 injustice while building the best motor
23 vehicles in the world.

24 While watching television news recently, I
25 have seen CEOs and Mary Barra of GM and

ORDER OF THE COURT

1 Michael Manley of FCA join together, time
2 and again, often with Bill Ford, to provide
3 some attention, leadership and skills to
4 solving social and economic issues for the
5 good of their companies, their workers,
6 their communities and our country. So, too,
7 I have noticed some attorneys devoting their
8 skills to provide equal justice for all
9 citizens, in particular, those less
10 fortunate who require representation in our
11 courts.

12 What a waste of time and resources now and
13 for the years to come in this mega
14 litigation if these automotive leaders and
15 their large teams of lawyers are required to
16 focus significant time-consuming efforts to
17 pursue this nuclear option lawsuit if it
18 goes forward.

19 I am ordering that no later than July 1st,
20 just the two CEOs, Mary Barra and Michael
21 Manley, meet in person with social
22 distancing to explore and, indeed, reach a
23 sensible resolution of this huge legal
24 distraction. This will enable these two
25 gifted individuals and their companies to

ORDER OF THE COURT

1 fully concentrate, in addition to their day
2 jobs, on providing the leadership and vision
3 this country requires and deserves in
4 solving the aforementioned critical issues.

5 Time is of the essence. So, I repeat; Mary
6 Barra and Michael Manley, meet face to face
7 in good faith and with goodwill to resolve
8 this huge legal diversion, to permit you and
9 your companies to also fully focus your
10 talents on healing this country as we all
11 embark on the critical road ahead.

12 I request that I hear from just both of you
13 personally on a Zoom or teleconference, no
14 need for both to again be present physically
15 in the same room, at noon, July 1st, 2020,
16 to provide me with the results of your
17 important discussions.

18 Thank you for attention to this order.

19 So ordered, Paul D. Borman, U.S. District
20 Judge, June 23rd, 2020."

21 Thank you. We are concluded.

22 MR. WILLIAN: Thank you, Your Honor.

23 MR. HOLLEY: Thank you, Your Honor.

24 (Proceedings concluded, 12:23 p.m.)

25 - - -

ORDER OF THE COURT

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1 CERTIFICATION OF REPORTER
2

3 I, Leann S. Lizza, do hereby certify that the above-entitled
4 matter was taken before me remotely at the time and place
5 hereinbefore set forth; that the proceedings were duly recorded
6 by me stenographically and reduced to computer transcription;
7 that this is a true, full and correct transcript of my
8 stenographic notes so taken; and that I am not related to, nor
9 of counsel to either party, nor interested in the event of this
10 cause.

11

12

13 S/Leann S. Lizza

6-25-2020

14 Leann S. Lizza, CSR-3746, RPR, CRR, RMR, RDR Date
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